United States Court of Appeals

for the Second Circuit

APPENDIX

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76-7454-7480

UNITED STATES COURT OF APPEALS
FILED
NOV 19 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

United States Court of Appeals
FOR THE SECOND CIRCUIT

BIG SEVEN MUSIC CORP. and ADAM VIII, LTD.,
Plaintiffs-Appellants,

against

JOHN LENNON, APPLE RECORDS, INC., HAROLD SEIDER, CAPITOL RECORDS, INC. and EMI RECORDS LIMITED,
Defendants-Appellees,

and

MORRIS LEVY,
Additional Defendant on Counterclaim-Appellant.

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BIG SEVEN MUSIC CORPORATION, et al.,

vs. 75 Civ. 1116

JOHN LENNON, et al.

New York, January 28, 1976;
10.30 o'clock a.m.

(Trial resumed.)

- -

THE COURT: Do you have the materials I asked about last night?

MR. SCHURTMAN: I was not clear last night as to the form that you wanted them.

THE COURT: I don't care about the form. I wanted a digest of the list of references in the transcript.

Has anybody gotten that up?

MR. GRUMBACH: We have prepared a document. Let me just describe it to you, because I think a little explanation is necessary.

Yesterday evening, although we didn't get the transcript, we addressed ourselves to the points that Mr. Schurtman stated were the agreement that had been made on October 8th, and what we attempted to do, your Honor,

was --

THE COURT: Look, I asked you something specific. I asked you something very simple. I asked for all the references in the transcript. I just need a list of the page numbers to all the references to the October 8th meeting and all the references to the discussion about rights, granting permission or otherwise.

MR. GRUMBACH: We have something that I think is substantially similar, but it is a little different. What we have done, we have tried to take all references to the October 8th meeting that we consider to be relevant to that particular period of time that we could, organize them by categories that Mr. Schurtman listed as the elements of the alleged deal. We have used the first trial, the examinations before trial, and the trial before your Honor up through the day before yesterday's transcripts and we have put them together organized by the subjects that Mr. Schurtman mentioned. We have taken only Mr. Kahl and Mr. Levy, because we suggest, and we will suggest to you late, your Honor, that those are sufficient to find that no deal of any clarity that could be a binding one was ever established. We also included the discussions about the permission from EMI, which I think you mentioned separately.

THE COURT: Will you give that to Mr. Schurman?

MR. GRUMBACH: I will do so now.

MR. PRETTYMAN: Your Honor, we will have before the end of the day a short legal memorandum in regard to specificity, and if you read it in connection with that, that will form the basis of an appropriate motion at the end of the cross-examination of those witnesses who were at the October 8th meeting.

MR. GRUMBACH: May we request to the extent that they have not already been introduced, that the sections of the examinations before trial that are included herein be deemed as admitted in evidence?

THE COURT: I think you got to be a little more precise than that. You have a right to introduce Mr. Levy's --

MR. GRUMBACH: And Mr. Kahl. That is all that is in there.

THE COURT: I think this has to be done just as a matter of form, I guess. I don't know that this is a clear form to go into evidence.

MR. PRETTYMAN: We would suggest that both depositions be marked and introduced in evidence, your Honor, and then they will be available for you so that you can refer to them. You will find at the end of that, in the

last couple of pages, some of the things which we believe would be relevant and important in a contract of this kind, which, significantly, Mr. Schurtman did not say was part of his alleged oral agreement.

THE COURT: Can I suggest this, that if you want to introduce into evidence excerpts from the discovery in this action, in the form of deposition testimony of Mr. Levy or answers to interrogatories, or whatever, it seems to me that you ought to get those documents and mark what you want to put in and have it introduced as an exhibit. That may be better than just this document.

Now, I assume that you don't want to put every word of the answers to interrogatories in, and I hope you don't. I think you would want to put the excerpts in that you were interested in, and that could be done with red underlining or whatever. I also would hope that you don't want to introduce every word of the depositions. The depositions of Mr. Kahl and Mr. Levy, I imagine, were rather lengthy, and it seems to me that I would hope that you would just hope put in the portions that you are interested in. But as far as the formality of that, get the documents, mark the portions you are interested in, get an exhibit number or an exhibit letter, and put them in that way. In this way the record is consistely made. Can you do that?

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MR. PRETTYMAN: We certainly can and we'd be happy to. We thought this would be a little more convenient for you.

THE COURT: I think this is probably a very helpful document but just to get the record of evidence formalized.

MR. PRETTYMAN: May I ask you this, sir?

Let's suppose we are interested in terms of the particular motion that will be based upon the document which was just given to you in page 10 of Mr. Levy's deposition for other purposes, for purposes of cross examining here and perhaps other motions we're interested in page 11. Am I to understand that you are interested now in having only page 10 introduced, in other words, do I make myself clear?

THE COURT: No, no.

MR. PRETTYMAN: Anything that was relied upon --

THE COURT: Look, any way that is appropriate. You can put it in at any point you can introduce or you can offer whatever parts of Mr. Levy's deposition you want to introduce.

MR. PRETTYMAN: In effect we are just striking those parts that we are not relying upon in any way.

THE COURT: A discovery deposition I hope doesn't

jpbr 2

all have to go in.

MR. PRETTYMAN: Yes.

THE COURT: Thanks a lot.

Now, we are going to examine Mr. Levy.

MR. GRUMBACH: Are plaintiffs going to turn in anything, can we find out?

MR.SCHURTMAN: What the plaintiffs did was two things. We made up a list of specific elements of the contract that were mentioned, the elements I mentioned yesterday. I did not make up a list of everything that happened at the meeting. What I also did was in effect prepare the summation on the contract points and I have page references in my summation of every point that I will make. I had set it up that form. I didn't realize your Honor wanted a written document because we frankly didn't have time to prepare it.

MR. GRUMBACH: That isn't fair. We turned ours in.

THE COURT: Nobody has done what I asked.

MR. SCHURTMAN: I'm terribly impressed by Messrs. Cleary, Gottlieb, Steen & Hamilton, but I simply couldn't prepare a lengthy document. We worked until 3 in the morning preparing what we did.

THE COURT: You haven't got a document to

jpbr 3

circulate?

MR. SCHURTMAN: No, I don't. But I do have an annotated statement to make but it is in my handwriting.

MR. PRETTYMAN: May I ask a question?

THE COURT: Yes.

MR. PRETTYMAN: I believe your Honor requested them, unlike us, to give all document references to these particular things including other witnesses. May I just inquire whether these include just their witnesses or do they include everybody's witnesses?

MR.SCHURTMAN: In my prepared summation I have annotations to every single witness and every exhibit.

THE COURT: Look, I asked for two things. One is I wanted a list of pages, every page in the eight or so volumes of transcript which refers to the October 8th meeting and refers to this question of the situation about Capitol's rights, EMI's rights, discussions about those contracts relating thereto. So that I just had a list of pages. Now, that's one think I asked for and nobody got that, that's okay. All you had was overnight. But that is specifically what I would like. Now, another thing I would like and maybe this is encompassed in the document given by the defendants this morning, I wanted the excerpts of all the discovery material relating to the nature

of the alleged contract. Those two things I asked for last night.

So I would like, you know, as soon as possible to get those if I haven't gotten them. Let's leave it at that. Okay. Thank you.

Who is going to cross examine Mr. Levy.

MR. BERGEN: I am,your Honor.

M O R R I S L E V Y, resumed.

CROSS EXAMINATION

BY MR. BERGEN:

Q You believed Mr. Klein in 1973 when he told you that Capitol had no mail order rights?

A Yes.

Q That's why you called him to check with him again on January 29th?

A I believe it was the 30th.

THE COURT: Let me have the last question and answer.

(Read back.)

MR. SCHURTMAN: I object to the form of the question, your Honor. Is it a question or an argument?

MR. BERGEN: Excuse me.

MR. SCHURTMAN: Is it a question or an

argument?

THE COURT: Read me the last few questions and answers.

(Record read.)

MR. SCHURTMAN: I objected to the form of the question.

THE COURT: Overruled.

Let us go on.

MR. BERGEN: Can I have an answer?

A If I can clarify. My recollection of calling Mr. Klein was that he called me back and I had called him originally the time I was having -- after the meeting with Seider is when I spoke with him.

Q In other words, you didn't speak to Mr. Klein until after you had the meeting with Mr. Seider on January 30th?

A I believe that's when he called me back.

Q So that Mr. Klein's testimony is wrong when he testified yesterday that he spoke to you on the 29th?

A I'm sure he was trying to be honest about it. My recollection is that when I spoke to him it was on the 30th.

Q But in any event you checked with him because you wanted to verify what he had told you in 1973 about

Capitol not having the mail order rights?

A That is correct.

Q Now, up to that point you never asked Mr. Lennon or Mr. Seider to see those Beatle contracts, had you?

A No.

Q But you never asked Capitol or EMI to see the contracts, had you?

A No.

Q Did you ever call EMI or Capitol to check out whether Mr. Klein's information was correct?

A No, sir.

Q Prior to the 30th?

A No, sir.

Q So that you were relying on what Mr. Klein was telling you?

A I was relying on what Mr. Klein was telling me and on tne Playboy article and the other knowledge that I had.

Q What was the other knowledge?

A That John Lennon in five or six years prior gave an album to another record company when he decided to.

Q Do you know if there was any written waiver given by EMI with respect to that record album?

A No.

Q Now, did Mr. Klein tell you where you could get copies of the Beatle's agreements?

A Well, when was this, sir?

Q In the conversation that you say you had with him on January 30th or at any time thereafter.

A I think thereafter my attorneys and I discussed it about getting it in discovery and it is possible Mr. Klein said it is all a matter of record in the courthouses. One of those two thinks took place.

Q Do you know which one?

A Maybe both, I'm not quite sure.

Q What is your best recollection?

A It is possible either one, Mr. Bergen, or both.

Q Do you recall Mr. Klein telling you where to get the Beatles' contracts?

A It is possible he did.

Q Let me read you from Mr. Klein's testimony. This is from his deposition.

"Did you ever tell him referring to me --

MR. SCHURTMAN: Are you reading from Mr. Klein's deposition?

MR. BERGEN: Yes, I am.

THE COURT: Is this something that he was asked about when he was here in court?

MR. BERGEN: Excuse me?

THE COURT: Was he asked about this when he was here in Court?

MR. BERGEN: Yes.

THE COURT: What did he testify?

MR. BERGEN: He testified he had told Mr. Levy.

THE COURT: Why don't you ask him about that?

MR. BERGEN: I just did.

He seems to say it was possible that anything could happen.

THE COURT: Allright.

Q Was Mr. Krasilovsky at the January 30th meeting with Mr. Seider?

A Yes, sir.

Q Well, I believe on your testimony you didn't mention Mr. Krasilovsky being there, you said only Mr. Schurtman was there?

MR. SCHURTMAN: Which testimony?

MR. BERGEN: Testimony in this trial.

THE COURT: What's the question?

MR. BERGEN: I asked him -- I'll ask him the question.

Q Can you tell us why in your earlier testimony you didn't mention the fact that Mr. Krasilovsky was there?

A I didn't remember. I didn't remember it at that time.

Q Was Mr. Krasilovsky there when Mr. Seider arrived?

A No, sir.

Q He came later?

A That is correct, sir.

Q It had been pre-arranged that Mr. Krasilovsky would be there?

A No, sir.

Q It wasn't pre-arranged that Mr. Schurtman was there?

A No, sir, I called them both while Mr. Seider was in the office.

Q Now, around this time, January 30th, you also tried to call Len Wood?

A I believe it was after January 30th, around that time but I think it could have been a few days later.

Q How many times did you try to call Mr. Wood?

A I believe I tried to call him a couple of times and some time in February, Mr. Uttal was going over and I asked him to talk to Len Woods that I would like to

talk to him.

Q Was there a reason why you tried to call Mr. Wood?

A Yes, sir.

Q What was the reason?

A I had known Led Wood and done business with him for about 22 years. I felt it was important that if I explained the entire situation to him that possibly there could have been a change in what was happening. I wanted him to know that I didn't just grab these tapes and was going to use them. I wanted him to understand everything that took place and I certainly wanted to get the air as clear as possible on what was happening.

Q Had you ever called Mr. Wood prior to that time about this subject matter?

A No, sir.

Q Now, Mr. Levy, page 233 of your testimony in this trial you testified, quoting Mr. Lennon at the farm. "We are making this package for Morris. It is going to be a unique package. It's never been done before. It is an exciting project."

I reviewed your deposition, Mr. Levy, and you never testified to that statement by Mr. Lennon. Can you tell us what refreshed your recollection between the time of

the deposition and the trial?

MR. SCHURTMAN: Your Honor, I object. We have here a deposition of about 800 pages and it depends on the questions he was asked. I didn't question Mr. Levy on this deposition, the defendants' attorneys did.

THE COURT: Absolutely irrelevant. I sustain the objection.

MR. BERGEN: Your Honor, all through Mr. Levy's testimony he has quoted liberally Mr. Lennon. Practically none of these quotes and a lot of the information he testified to --

THE COURT: That isn't the point. The point is what Mr. Schurtman brought out. Unfortunately you may have an argument but in order to pursue that kind of thing, it would really have to be brought out exactly what kindof questions were asked, whether there was a question that would call for that answer and obviously if you have a question that calls for the answer and you read the question and answer and you ask him why didn't you refer to that in our deposition? Why did you only refer to it for the first time at the trial, that's a sensible question. But yours, I couldn't expect a witness to answer that.

MR. BERGEN: Mr. Levy was asked on his

deposition what Mr. Lennon said at the farm..

THE COURT: Read that question and answer.

Q Mr. Levy, I believe you testified earlier in the trial that Mr. Crocker was at the Club Cavallero the night the tapes were delivered?

A Yes, sir.

Q I will read from your deposition. Page 357:

"Q Do you recall whether it was the dinner that Frankie Crocker attended?

"A I believe it was before that. And of course I already had the tapes at the dinnerwith Frankie Crocker, the tapes were in my possession."

Do you recall that testimony?

A Yes,sir.

Q You also testified that the engineer or the part owner of the Record Plant were there the night the tapes were delivered?

A Yes, sir.

Q Excuse me?

A Yes, sir.

Q I read you from the same page, 357:

"Q Do you recall whether or not anyone else was present before he informed you that he was all done?

"A No,not off the top of my head."

Do you recall whether the engineer was there that night?

A I believe he was, Mr. Bergen.

Q Now, did either Big Seven or Adam VIII or you or Roulette Records pay anything towards the Spector recording costs?

A No.

Q Did either Roulette, Big Seven, Adam VIII pay anything towards the rock and roll October 1974 recordingcosts?

A Only if you want to consider getting musicians to the farm, taking care of chauffeurs to get them up there, feeding them, if you wanted to consider that, rehearsals are part of recording costs, if you want to consider that, you can. But I wouldn't call it actual studio time. But he would have had to rent studios if he didn't do the rehearsals up at the arm.

Q Were you present during any of the recording sessions?

A No, sir.

Q Any of the re-mixing?

A No.

Q Was Mr. Kahl?

A No, sir.

Q Was anybody from Big Seven or Adam VIII?

A No, sir.

Q Now, in the October 1973 Come Together settlement, did you contemplate that the next album would be the rock and roll album?

A Well, that's something I think the lawyers have agreed here in terms. It really wasn't the next album. There was an album that was explained to us that was already being in the process of being worked on that was almost complete. It would be the one after that. But everybody agreed, I believe, at one of the depositions that we'll call it the next album.

THE COURT: Call what the next album?

THE WITNESS: Walls and Bridges, or the album that was supposed to contain the three songs, your Honor.

THE COURT: I just don't understand. Could you read the question and answer.

(Record read.)

THE COURT: That doesn't mean anything. Agreed at a deposition. It is worth pursuing, Mr. Bergen, you have got to pursue it.

Q You were aware in October of 1973 that Mr. Lennon was recording a rock and roll album at that time?

A No. There was another album that was

scheduled for release.

THE COURT: Look, Mr. Levy. You listen to Mr. Bergen's question. Limit your answer to that question. You are saying you were not aware of the recording of a rock and roll album?

A I was aware there was going to be one. He was asking me if it was being recorded right at that time.

THE COURT: You were aware there would be a rock and roll album?

A Yes. He asked me whether I was aware of it being a recording at that time.

T3 am

mms Levy - cross

MR. BERGEN: Read back the last part of the answer.

(Answer read.)

Q You have testified that on October 8 you gave up the breach of the Cpme Together settlement in exchange for this new agreement?

A That is correct.

Q Was the giving up of the settlement conditional on getting the TV package? Actually putting it out?

A I don't follow what you mean by conditional.

Q Well, suppose in this case that a week after the October 8th meeting Mr. Lennon had said, "I am not going to do the album for you," would you still have had your right to sue under the Come Together settlement?

MR. SCHURTMAN: I object.

THE COURT: Sustained.

Well, wait a minute. I suppose that this witness has got to have some understanding of the contract he thought he was entering into. Now, if you could phrase it in those terms, Mr. Bergen, what was his under standing of the agreement, not what he is cogitating today.

Q Did you think at the time that if Mr. Lennon had not delivered the album to you you could still sue under

the Come Together settlement?

A We made a deal, Mr. Bergen, that he would deliver the album to me on that day, that I was going to release the album domestically, and if he got permission from EMI, would release it worldwide.

MR. BERGEN: May I have the question read so this witness can answer it?

THE COURT: Mr. Levy, on October 8, 1974, or shortly thereafter, were you actually thinking about what you could do with the old settlement if this alleged new agreement was not carried out? Were you thinking about that?

THE WITNESS: After October 8, your Honor?

THE COURT: No, about the time you say the new contract was entered into.

THE WITNESS: On October 8?

THE COURT: Yes.

THE WITNESS: I was thinking I had solved the whole problem; we made a deal.

THE COURT: Were you thinking about remedies in the event that the new deal was not kept?

THE WITNESS: No.

THE COURT: He was not thinking about that. I don't think it is going to help you to pursue that.

MR. BERGEN: I submit that is an essential element of the claim here, that he could not be thinking about it.

MR. SCHURTMAN: I disagree.

THE COURT: I don't really think so. I don't know what Mr. Levy was or was not thinking, but I don't want to have a lot of time taken up pursuing things that perhaps he was not thinking about. You got to ask him if he was thinking about it, and after a reasonable amount of examination if he keeps telling you he was not even thinking about it, then that is his testimony.

Q Mr. Levy, you testified that the Come Together settlement was a very valuable settlement?

A That is correct.

Q My question to you is, suppose a week later Mr. Lennon had delivered you a tape that was partially blank, had some songs that didn't sound right, and was, in effect, just a mess, would you still have had your rights under the Come Together settlement?

MR. SCHURTMAN: I object. That is a hypothetical question. It calls for a legal conclusion. The question should be, what was he thinking at that meeting.

THE COURT: Absolutely. Objection sustained.

Q Was it then and there, on October 8, the agreement and part of the agreement that you allege was entered into on October 8, that at that moment you would drop your claim with respect to the Come Together settlement no matter what happened thereafter, and not sue on that settlement?

MR. SCHURTMAN: I object to that.

THE COURT: Let us hear the question.

MR. SCHURTMAN: I object to the question. It is a compound question.

THE COURT: If Mr. Levy can answer it and understand it.

THE WITNESS: I don't really understand it.

THE COURT: That is the answer.

THE WITNESS: I don't understand the questioni

Q Was one of the terms of this alleged agreement entered into on October 8, 1974, that you would drop the Come Together settlement in exchange for this new agreement?

A Yes, that is what we did.

Q Is it not true that it was part of the agreement after that night that you would not sue Mr. Lennon with respect to the Come Together settlement, no matter what happened?

A No. In other words, we made an agreement;

we absolutely made an agreement that he would deliver a tape to me for the domestic and I made an agreement and instructed my attorney, Mr. Krasilovsky to forget about it, is all settled, and I am getting a tape and he is recording an album for me, and forget about the Come Together settlement.

Now, to conjecture about what I would do if he did not, that is why we are here.

THE COURT: Well, that is not the only reason. I think we have enough on that particular point. Let us go on.

Q Mr. Levy, you testified that you told Mr. Lennon that the normal price for TV mail orders for single records was $4.98?

A Yes.

Q I show you four Adam VIII albums and ask you if you have ever seen those albums before?

A Yes, sir.

MR. BERGEN: May we mark these, please.

(Defendants' Exhibits CI-1, CI-2, CI3 and CI-4 were marked for identification.)

xx Q Mr. Levy, I ask you if those are Adam VIII packages?

A Yes.

Q What is the price?

A $3.98, $3.98, $3.98, and $3.98.

Q These were all sold through television?

A These were all for in store retail promotions and not for mail order. These were made specially made for retail fulfillment centers, and that is a few years ago, and now the bottom price is $4.98, and some people pay $5.98.

THE COURT: Were these all before 1974?

THE WITNESS: I could not testify. Some of them might have been and some may not have been.

Q Can you tell us?

A I could not in all honesty. If you give me the catalog list it gives me the sequence. It may give me a better clue to it.

MR. SCHURTMAN: Mr. Levy, I show you Plaintiffs' Exhibit 81.

Is that the list you want?

THE WITNESS: What are those albums. This I would believe was prior to.

THE COURT: That is CI-3.

THE WITNESS: Soul Train and Hall of Fame, which is like the fourth album in the Adam VIII catalog I would assume that is prior to 1974.

Q How long has that album been sold?

A We stopped selling it maybe three years ago. We unloaded them all as overstock.

Q How long a period of time was this album sold?

A On TV with us?

Q Yes.

A I would venture about five or six months.

Q What about the next one, CI-1?

A That is the 16th album. This may be just around that time or possibly after. If you want, I can check and give you the exact dates.

Q Is that album still being sold on television?

A No, sir.

Q CI-2?

A That is the eighth album that came out. I would say that is prior.

Q What about the other one, CI-4?

A That was also one that came out jointly, the fifth album.

Q That was pre-October 1974?

A To the best of my knowledge it would be.

MR. BERGEN: I offer them in evidence.

MR. SCHURTMAN: No objection.

(Defendant's Exhibits CI-1, CI-2, CI-3 and CI-4

xx

were received in evidence.)

Q Mr. Levy, do you know how the royalty payments to Mr. Lennon were going to be split between Lennon and Apple?

A No, sir.

Q Was that discussed at all?

A Just that he will take care of that, and I believe there was a remark about somebody getting their money back for recording on dead masters. But basically that was in Mr. Lennon's area.

Q There was not any discussion about how the 4 per cent would be split between Apple and Lennon?

A No, sir.

Q When were the royalty payments to be made to Mr. Lennon?

A Well, that was not discussed, but that would the type of thing that would be pinned down in the final agreement. As an example, Mr. Bergen, right now --

MR. BERGEN: Your Honor, instead of getting a speech every time I ask a question, I would like to just get an answer. It was a very simple question.

THE COURT: Mr. Levy, just listen carefully and you answer directly.

Q When were the royalty payments to be made?

A It was not discussed at that meeting.

Q Did you assume that it would be semi-annually?

A No.

Q Mr. Levy, I read from page 723 of your deposition:

"A We never discussed whether it would be semi-annually or quarterly, the payments, but I just assumed it would be semi-annual. We never got into when the payments would be."

Does that refresh your recollection?

MR. SCHURTMAN: How is that inconsistent?

MR. BERGEN: I asked him a specific question: "Did you assume it was going to be semi-annually," and he said, "No."

THE COURT: Mr. Bergen, you know there must be more basic things that you can take up in cross-examining Mr. Levy than what you have done this morning. I am at a disadvantage complaining about delay, because I kept you sitting here for half an hour. But my feeling about that disappears gradually during the morning, and I have got to insist that if you are going to cross-examine a witness we get something that makes a difference.

MR. BERGEN: This makes a difference. It goes to the duration of the agreement.

MR. PRETTYMAN: This is one of the important elements in the case.

THE COURT: He has testified that there was no discussion of the time of payment at all.

MR. PRETTYMAN: If he assumes that it was going to be semi-annual, it then directly relates to the term of the contract and you immediately enter into the statute of frauds question. It is extremely important in this case.

THE COURT: What is the deposition testimony?

MR. BERGEN: The deposition testimony is at page 723:

"We never discussed whether it would be semi-annually or quarterly, the payments, but I just assumed it would be semi-annually. We never got into when the payments would be."

MR. SCHURTMAN: How does that assumption in the witness' mind not expressed to the other side have any bearing on the statute of frauds?

THE COURT: I will receive it.

Q Now, when would the first royalty payments be due to Mr. Lennon under a semi-annual payment?

A Under a semi-annual payment --

Q Based on the release of the Roots album in

February?

A 45 days after June.

Q That would be about August 15?

A That is correct.

THE COURT: About August 15 of what year?

MR. BERGEN: Of 1975.

THE WITNESS: Of that year.

Q When would the royalty payments be due for sales for the second half of 1975, from July through December?

A About the 15th of February.

Q 1976?

A That is correct, sir.

Q Mr. Levy, do you know who the photograph that was used on the cover of the Roots album was purchased from?

A No, sir.

Q Did you have anything to do with the purchase of the photograph?

A Just paid for it.

Q Did you instruct people --

A Yes, I instructed them to find photographs of John Lennon that they could buy.

Q Can you tell us when you instructed one of your people to buy the photograph?

A It was right after the meeting with Seider and between the time we came out with the Album. It was very quick. We wanted to move very quickly.

Q Mr. Levy, I show you a document that has been marked as Defendants' Exhibit AG for identification, which was produced by your attorneys for us.

Have you ever seen that?

A No, sir.

Q Mr. Levy, the letter is addressed to Adam VIII. It says:

"Your company is responsible and liable for permission and release of the talent photographed and pictured, namely, John Lennon."

MR. SCHURTMAN: What is the letter being referred to? I have not seen it.

THE COURT: Is this AG?

MR. BERGEN: Yes.

THE COURT: It is a letter from whom to whom?

MR. BERGEN: From William E. Dietz Associates Photography to Adam VIII, Limited, dated February 7, 1975, and it is addressed [illegible]r. Balitsos.

THE COURT: Are you offering it?

MR. BERGEN: Yes.

THE COURT: Any objection?

MR. SCHURTMAN: Can I look at it?

THE COURT: Sure.

MR. SCHURTMAN: I have no objection.

THE COURT: Received.

(Defendants' Exhibit AG was received in evidence.)

xx Q Now, Mr. Levy, again referring to this letter, it says:

"Your company is responsible and liable for permission and release of the talent photographed and pictured, namely, John Lennon."

Did Adam VIII ever get the permission of Mr. Lennon to release this photograph?

A I believe we got it on October 8. It goes with the album.

Q Did you ever get Mr. Lennon's permission to use his photograph or his name or likeness on the Roots album in writing?

A No, sir.

THE COURT: May I see the letter again.

Was it your understanding that in order to put John Lennon's picture on your album you had to have his permission?

THE WITNESS: No, sir, it goes automatic with a

record album, whenever you put out a record, if you make a record deal, it is part of the deal that you are going to use pictures and likenesses in selling the record of this particular artist. It is standard with the deal, you have the right to put his picture on the album.

THE COURT: Can you put any picture on?

THE WITNESS: That varies with the artist, your Honor. That varies to the extent of the importance of the artist. In other words, if you sign an agreement with someone not important, he has less to say. If it is an important artist -- and that is the reason I called May Pang at that point to see if there was any particular picture that John Lennon wanted on the album.

THE COURT: You had not at that time got permission from John Lennon to use the picture that appeared on Roots?

THE WITNESS: No, sir.

MR. SCHURTMAN: I object to the form of the last question.

You mean the specific picture? Or a picture of John Lennon?

THE COURT: I meant the specific picture.

You understood my question?

THE WITNESS: Yes.

THE COURT: What you are telling me is you believe that it was implicit in the October agreement that you had a right to use some picture?

THE WITNESS: Yes, sir.

THE COURT: Let me just go back.

As far as the right of the artist to select a picture, if it is an important artist he normally has the right to select it?

THE WITNESS: He certainly would be consulted and his wishes would be respected, whether it says so in the contract or not.

THE COURT: Is this something that would normally be in the contract, the question whether he had the right to select the picture and so forth? Is that something that would normally be in a contract?

THE WITNESS: Yes and no. If it is a very, very important artist he takes a lot of control of things like that. If he is less important, he has less rights, your Honor.

Q Isn't there a provision in recording contracts giving the record company the right to use the name and likeness?

A Yes, sir, I believe it is.

Q Now, is it standard policy of Adam VIII to

advertise other artists' albums on the back of the jacket?

A Yes, I think we have it on every album we have put out basically.

Q Did you ever discuss this policy with Mr. Lennon?

A No, sir.

Q You testified that the agreed price of the records were $4.98 and the agreed price of the tapes was $5.98?

A Yes, sir.

Q I show you, Mr. Levy, a document that has been marked as Defendants' Exhibit AD for identification.

I ask you if you can identify that document, please?

A Yes, sir.

Q Will you tell us what it is?

A It i s mail order fulfillment sheet.

Q It is an Adam VIII document?

A Yes, sir.

THE COURT: What is the number of the letter?

MR. BERGEN: AD, your Honor.

I offer it in evidence.

THE COURT: Do you object?

MR. SCHURTMAN: I do object. On this one I would like to call the clerk who put the figures in, because it is my understanding they are not correct.

THE WITNESS: And it is all crossed out.

THE COURT: They are all crossed out?

MR. SCHURTMAN: Mr. Levy did not write this.

MR. BERGEN: Could we have Mr. Levy's testimony, rather than Mr. Schurtman?

THE COURT: Sure. Why don't you ask him.

There is an objection now, so you lay your foundation.

MR. BERGEN: The foundation is that these were produced to us by the plaintiffs, including the first page, which the plaintiffs typed up gave to us, their attorneys, shipping orders, sales of records and tapes. It is precisely the way we got it.

MR. SCHURTMAN: But that does not make it admissible.

THE COURT: Do you know about this?

THE WITNESS: No, sir. This is something they supplied them --

THE COURT: Something what?

THE WITNESS: Something that he says was supplied to them and it is all crossed out.

THE COURT: In other words, you are telling me you don't have any personal knowledge of that document?

THE WITNESS: No, sir, I didn't see it before today.

THE COURT: Now, Mr. Schurtman, what knowledge do you have of the document?

MR. SCHURTMAN: Your Honor, I am informed a shipping clerk had originally written in the wrong figures and the figures were crossed out before the document was delivered to Mr. Bergen.

THE COURT: I know that.

Is this a document from Adam VIII?

MR. SCHURTMAN: Yes, it is a document from Adam VIII.

THE COURT: Do you know what it relates to and why you produced it?

MR. SCHURTMAN: Mr. Kanzer will explain it.

THE COURT: Can you help us out?

MR. KANZER: As I understand it, this document was furnished in response to a request as to how many albums were actually shipped out. This is an inventory. The price had inadvertently been put down inaccurate. All the document purports to show is how many were actually shipped out and nothing else.

MR. SCHURTMAN: If it is being offered for that limited purpose, to show how many were shipped out, then I have no objection. It it is offered for the purpose of showing the price, then I do object.

THE COURT: What is it being offered for?

MR. BERGEN: To find out what price. We were told it is $4.98 and it is appears on the document that it was $5.98.

THE WITNESS: It has been crossed out.

THE COURT: The witness can't help on this document. The person who might help is not here. We have this explanation from the attorneys. So I think you better hold up on this.

Q Mr. Levy, I show you a document that has just been marked as Defendants' Exhibit CJ for identification and I ask you if you know what that document is?

A No.

(Continued on next page.)

jpbr 1 Levy-cross

Q You've never seen that before?

A No, sir.

MR. BERGEN: Your Honor,this was also produced to us by the plaintiffs during the trial. It is entitled Adam VIII Limited, Sales Analysts. The figure next to Lennon which I assume, that would refer to the Lennon album, Mr. Levy, I would assume, yes.

MR. SCHURTMAN: Before you read it into evidence, may I see it?

MR. BERGEN: I haven't read anything into evidence.

MR. SCHURTMAN: You were about to read it.

THE COURT: All right without all of this, show it to him.

MR.BERGEN: May I, if your Honor please --

THE COURT: Are you offering CJ?

MR. BERGEN: Yes, I am.

THE COURT: Is there objection?

MR. SCHURTMAN: No objection.

THE COURT: All right, CJ is received.

MR. BERGEN: I am a little perplexed as to how to get the information on this in, your Honor.

THE COURT: Does it speak for itself?

MR. BERGEN: It speaks for itself if you

divide the 31 units for records into the dollar amount under the column for records of $178.38. That comes out to $5.75 and I wanted to ask the witness what the explanation was for that.

THE COURT: You've done the mathematics. Can I see that for a second? You have got a column here, "Lennon," right. It has got sales $178.38, is that what you are talking about?

MR. BERGEN: Yes, for 31 units. That's under the column Records.

THE COURT: And you have divided it, right?

MR. BERGEN: That is correct.

THE COURT: $5.75, right.

MR. BERGEN: Approximately.

THE COURT: We'll take your word for it. Now ask your question.

A How did that happen?

Q Can you tell me why the 31 units comes out to $5.75 per unit?

MR. SCHURTMAN: I object, your Honor. This witness did not prepare the document. The document was prepared by an accountant who will testify at this trial.

THE COURT: If he doesn't know, he'll say he doesn't know. There is nothing wrong with the question.

A I believe I do know even though I didn't prepare the document, your Honor. That is basically -- that would pick up the gross income on the album. We send out CODs, Mr. Bergen, that people pay the COD. The check that arrives from the postal authority where we prepay the COD cost would be 80 cents or 90 cents or 75 cents depending on the area larger than the price you are selling the album. We get, in other words, your Honor, when you mail a COD, you have to prepay the COD cost, and the commercial says "Save COD charges and send a check." You collect a mail cost from the customer so the check that comes from the United States Postal Authority would be 75, 80 cents higher than the selling price of the album.

THE COURT: I don't understand. You are talking about mail order sales?

THE WITNESS: Yes, sir.

THE COURT: In other words, if someone wants to make a mail order sale they have to pay what?

THE WITNESS: No, if you want I'll try and give you an explanation.

At the end of our commercial there is a 14 second thing where the guy says send your check -- call this number and we'll ship you the album and you will pay for the album when it arrives. Then it will say, "Save COD

charges and mail your check as you order."

Now, when a person used the phone --

THE COURT: Can I interrupt you. Are some of these things sent COD in that the person deliveres to the door and the buyer gives him moneys?

THE WITNESS: The postal authorities.

THE COURT: That is COD.

THE WITNESS: That is COD.

THE COURT: Now, is the COD the $5.75?

THE WITNESS: That is correct, sir.

THE COURT: So the simple answer is that COD if 5.75?

THE WITNESS: But it is still $4.95 for us. The government takes the rest.

THE COURT: The government takes what?

THE WITNESS: That 80 cents. We prepay that 80 cents at the fulfillment center.

THE COURT: If they want to send in a check in advance they pay the 4.98?

THE WITNESS: They save the COD charges that the government would impose on the mailing.

THE COURT: Why would the 5.75 appear as your revenue?

THE WITNESS: Because we pay -- the government

also insists that on a CODmailing. You pay that charge prior to them taking it out and when they collect, they give you the full check. There is even another thing that is involved, your Honor. If the person don't accept the package, you got to pay another 80 cents to get the package back because the government charges you twice.

THE COURT: You consider the delivery charge an expense?

THE WITNESS: That the customer chose to assume by having it sent COD rather than mailing a check.

THE COURT: All right, Mr. Bergen. Go ahead.

Q Now, is it the usual practice of Adam VIII to sell through a mail order campaign first and then follow that with the retail fulfillment?

A Yes, sir.

Q Was that your intention with respect to the Roots album?

A On what date, sir?

Q On October 8th?

A Yes, sir.

Q You wouldn't do those two simultaneously?

A Possibly if we were running the two-thirds or one-third of the country in a retail fulfillment setup, we might be running the other area in mail order and then

when that would be over, we would move the goods over and take it off mail order and put into retail fulfillment. It might be going on simultaneously in different parts of the country but we would not do it in the same area of the country simultaneously.

Q How long would that mail order campaign take?

A If it was going to be pure mail order without going retail fulfillment or with the plan of going retail fulfillment?

Q I'm talking if you were going retail fulfillment.

A The first couple of sections would probably come off within six, seven weeks.

Q Now, when was the Roots album released, I guess we have it as early February?

A I believe that's it.

Q Did you get it out as fast as you could after the Seider meeting on the 30th?

A Yes, sir.

Q Was the reason for returning it to get it out before the Capitol album?

A There was two reasons. One we were rushing it to get it out as quick as possible so we could get it on the air and the other one was to -- that we were told by Mr. Seider we were going to be enjoined and they were going

for an injunction and we were preparing for that at the same time.

Q You wanted to get it out before an injunction was ordered?

A No, sir. We wanted to get it out so we would get the injunction and face up to it.

Q What was the original planned release date of the Roots album?

A I don't follow that question, Mr. Bergen?

Q Well, after the October 8th meeting, did you have a release date that you had scheduled for the album?

A That I would have liked to have had. We didn't schedule it in that sense at the October 8th meeting. We were going to move it as quickly as possible and get the various -- in my mind I would have liked to have seen it come out mail order the beginning of January and start retail fulfillment February 1st. I certainly would have liked it to happen that way.

MR. BERGEN: May I have that answer read back.

(Read back.)

Q Well, were you planning for any release earlier than February?

A I don't follow what you mean by planning.

That's what I would have liked to have happened if everything went smoothly and was done, that's the dates thatwould have been the ideal situation, Mr. Bergen.

Q Let me readyou from your deposition of page 63:

"A I have to check it out. We have discussed in November, early November with someone of the publishers that were involved because we were planning the release of those tapes in late October, early November."

Does that refresh your recollection that you were planning the release of the tapes in late October, early November?

A Mr. Bergen, I think that question you are talking about is publishers. Did you say something about publishers? That would be getting rates for mechanical licenses, the context of that ebt.

Q I'll read it to you again:

"Because we were planning the release of those tapes in late October, early November."

Does that refresh your recollection that you were planning the release of the tapes in late October, early November?

A There's no way it could have been done in late October, early November.

THE COURT: Was there any distinction

between release of tapes and release of records?

A No, sir. You mean to the general public?

THE COURT: Yes, sir.

A No, they usually go simultaneously.

THE COURT: I don't know what the context is there, so I can't really judge what it means.

Q I'll read a couple of questions before.

THE COURT: Fine.

Q "Q Did you and any of the companies with which you are connected obtain a mechanical license for any of the songs of the Spector tapes?

"A Yes.

"Q Which ones?

"A I have to check it out. We have discussed in November, early November with some of the publishers that were involved because we were planning the release of those tapes in late October, early November. We did discuss a license with the various, some of the publishers on those tapes."

Now, after the meeting of January 30th with Mr. Seider, did you change the original release date?

A I don't follow you. We went as soon as we could right after that meeting. We started releasing

immediately. If Mr. Seider had delivered the permission and okayed everything as he was supposed to in the beginning of January or late December, we would have been out, as I suggested what would have been ideal.

Q Can you explain what you mean by if Mr. Seider had delivered the permission?

A Mr. Seider was telling me at all times that he was taking care of everything. And not based on knowledge, I knew then, but based on knowledge we know now he wasn't. He was telling me that everything was going to be okay and it was just a matter of time and he stalled me until the end of December. It was a big deal, it means a lot of money for John Lennon to wait to get the approvements signed. It proved to be the Beatle break-up and it did mean a lot of money to John to stall the thing to that point and he never came in and said okay, everything is clear. Except that he did say that the US Was okay for mail order and then later on the told me in November the US was okay for retail fulfillment centers. But he never followed through on getting everything done that we were supposed to do and everything else.

MR. BERGEN: I would like to say for the record one of the reasons that this cross examination is taking so long is that Mr. Levy does not answer my questions. He makes

a speech or he argues with me.

THE COURT: I don't think that your questions are all that easy to answer.

Now, I think sometimes they are simply not realistic. Let me illustrate. The direct testimony of Mr. Levy, and of course you don't agree with it, but this is his position and this is what you are cross examining him about. It is that he made a contract on October 8th that had what he considered the essentials of a deal made. He said he had honed to have this released as soon as possible and they were going to work along. Now, again, you reject that but that's what he says.

Now, then if you try to question him about changes in planned release date, he sits there. He doesn't quite know what to say because he never told you he had a planned release date. So then he makes a long speech. I would have made the same speech if I were Mr. Levy. Now, I think we can -- you know, you've got to cross examine him. He is not another witness. This is Mr. Levy you are examining. If it was Mr. Seider you would ask him a different set of questions or if it was, you know, Thomas Watson of IBM you'd ask him a different set of questions. This is Morris Levy. Now, you have to examine him within the framework of his testimony which you are really not

doing and that's why we get kindof bogged down, I think.

Now, both of you can help. We'll take a little break. I will return and if there is a question that you do not understand or it doesn't apply to the situation, all you have to do and you can save us a lot of time, is say this isn't the way I was thinking, or this doesn't apply or I don't understand your question. Or no.

Mr. Bergen, I would ask you to look over your outline of cross and try to clamp down the things that are really within the framework of the direct.

I'll see you in a few minutes.

(Recess.)

Q Mr. Levy, paragraph 17 of the amended complaint alleges that on or about December 11, 1974, Big Seven assigned its rights under the October, 1974 agreement to Adam VIII which immediately commenced preparation to release the album.

What preparations did Adam VIII immediately commence?

A We started talking about TV commercials. I think I testified earlier we started to makeup story boards to submit to Mr. Lennon.

Q Anything else?

A No, sir.

THE COURT: What was the date of the assignment again?

MR. BERGEN: December 11th, your Honor.

Would you read back the witness' answer, please.

(Read.)

Q Now the story boards are for the TV commercials?

A That is correct, sir.

Q Mr. Levy, I show you a document that has been marked as Defendants' Exhibit AS for identification and ask you if you can identify that document?

MR. BERGEN: Your Honor, I would like to state for the record that this is not a complete set of the responses and objections of the plaintiffs to the Apple Records, Inc. first set of interrogatories. We have kind of culled out the things that are not relevant.

A What was the question again?

Q Can you tell us what that document is?

A It is something to do withthe court.

Q Do you recall signing those answers to interrogatories and you can turn to the last page?

A Yes.

Q That's your signature?

A Yes.

Q Now, referring to the answers to Interrogatory 24 and I quote "Describe and identify by date all preparations taken by Adam VIII to which reference is made in paragraph 17 of the complaint? Further identify any contracts, agreements or expenditures entered into pursuant to such preparation."

Response "Adam VIII began to look for photographs andplan the jacket."

Now, does that refresh your recollection as to something else that Adam VIII did?

A Possibly we did this too. I believe we did this too, then.

Q There isn't any reference in this response to interrogatory 22 to the story boards or the TV commercials, is there?

A No, sir.

MR. BERGEN: I offer that Exhibit AS in evidence, your Honor.

THE COURT: Any objection?

MR. SCHURTMAN: Can I just see what is included in AS.

mms

MR. SCHURTMAN: Mr. Bergen, are you offering the entire exhibit or only the portion dealing with what the witness just testified to?

MR. BERGEN: The entire exhibit.

MR. SCHURTMAN: No objection.

(Defendants' Exhibit AS was received in evidence.)

Q With respect to the TV mail orders, Mr. Levy, did the bulk of the orders come in right after the ads appeared on television?

A It builds, yes, yes, and it builds.

Q Excuse me?

A It builds as you go along.

Q Isn't it true that the biggest sales are in the early part of the campaign?

A By early part, Mr. Bergen, do you mean like the first four or five days? The first two weeks or first two months?

Q The first couple of weeks.

A Depending on the package, but they usually build. It would get better even as you go a little further, and that is possibly because as they see it more and more. People can miss it the first time and it can get better after the first, second, third week.

Q Referring to Exhibit AS in evidence, the responses of the plaintiffs to Apple Records, Inc. first set of interrogatories, referring to Interrogatory No. 10, is that answer correct, that the gross sales for the year ended June 30, 1974, for Adam VIII were $14,577,300?

A I would assume so.

Q Is it also accurate that there is a net loss for Federal income taxes of $431,159?

A Yes.

Q At any time during the October 8 meeting did you tell Mr. Lennon or Mr. Seider that Adam VIII had lost over $400,000 on sales of approximately 14-1/2 million dollars in one year?

A No, it was never discussed.

Q Did you tell Mr. Seider that?

A I probably did not know at that time.

Q Do you know approximately how many units of records and tapes of the Roots album have been sold by Adam VIII to date?

A A negligible amount, a very small amount.

Q Can you give us an approximation?

A Just a guess, a couple of thousand, 1500.

Q Did sales of the Roots album continue through May, June, July, August and September of 1975?

A We had no commercials running. I don't believe we ran any TV commercials.

Q Did you sell any albums during the period from, say, May 1 through October 31, 1975?

A Only if somebody saw another copy and wrote a letter in. We did nothing to do sales. We had no fulfillment to ship them, except if somebody wrote a letter and ordered it. We did nothing to solicit sales through advertising.

Q I didn't ask you that.

Do you know whether sales occurred during that period?

MR. SCHURTMAN: He answered the question.

THE WITNESS: One or two might have been sold by persons writing in direct.

Q Do you know whether there have been any sales between November 1 and today?

A If somebody wrote a letter in and asked for a copy we probably would send it to him.

THE COURT: Do you have stock?

THE WITNESS: Yes.

THE COURT: How many?

THE WITNESS: A negligible amount.

THE COURT: If I wrote in could I get one?

THE WITNESS: Yes, sir, if you wrote in.

THE COURT: You have what? _ few hundred or ten or a dozen?

THE WITNESS: No, I imagine -- may I look at it -- we pressed a few thousand. We sold only a few thousand, and we stopped advertising. We could not advertise. So it is negligible. It is not thousands, I don't believe.

Q Mr. Levy,I show you a document that has been marked Defendant's Exhibit AU for identification, which are the responses and answers of plaintiffs and ask you if you have ever seen that document or a part of it --

MR. BERGE: And, again, your Honor, we have excerpted this one.

THE COURT: This is AU?

MR. BERGEN: Yes.

A I signed it.

Q You signed it?

A Yes, that is my signature.

Q I refer you to the answer to Interrogatory 23: "Sales still occasionally occur."

A Still occasionally occur. That is what I just said.

Q When were the answers to interrogatories signed?

A I don't know.

THE COURT: What is the date? You have the date.

MR. BERGEN: October 14, 1975.

THE WITNESS: Yes, sir.

MR. BERGEN: I offer this in evidence, your Honor.

MR. SCHURTMAN: May I see it?

THE COURT: I will receive.

(Defendants' Exhibit AU was received in evidence.)

xx THE COURT: Are you going to ask him about the figures that were discussed, according to Mr. Seider, at that November meeting?

MR. BERGEN: Yes.

THE COURT: That might be helpful. A lot of this other is really not. I wish you could get something in that would be helpful and that was not covered on his direct and let us get it over with and go to the next step.

Q Mr. Levy, do you recall the meeting with Mr. Graham in the middle of November, 1974?

A Yes, sir.

Q You testified at page 27 of this trial that you discussed some other things? Were some of the other

things the non-Beatle inventory?

A I believe so.

Q Is it your testimony at the Graham meeting the figures you went over were for a European joint venture?

A That is correct. Also, we discussed some of the American things.

Q I am talking about the figures? Were they for your European joint venture?

A We also discussed figures for here, too. Basically it was for a European joint venture.

Q When you say basically, I am a little confused. Were the figures that were discussed for the European joint venture or were they for United States retail fulfillment sales?

A I could answer that question, but it would take a lot to answer it, Mr. Bergen.

THE COURT: No, it does not. I think the best way to approach it is, what is your best memory and as completely as possible as to what was discussed at that meeting regarding figures.

THE WITNESS: We discussed basically the joint venture in Europe, and in discussing that we talked about some of the sales practices here in the United States as compared to that.

THE COURT: Did you and Mr. Graham and Mr. Seider attempt to estimate the costs related to a Rock and Roll album and the profit which you and Mr. Lennon and EMI, or anybody else would derive from this album?

Did you engage in such discussions?

THE WITNESS: Yes, sir.

THE COURT: Now, what were those discussions?

THE WITNESS: We discussed the joint venture in Europe. Then in comparison, when we talked about advertising, we then compared it to what the advertising costs here; we discussed the mail order --

THE COURT: Don't tell me just the topics. Who said what? Did somebody start with a price? Did you try to estimate pressing costs and advertising costs and payment for copyrights? What was said, if anything, about those things?

THE WITNESS: We did exactly that. We discussed copyrights.

THE COURT: What was said awbout them?

THE WITNESS: That it is different in Europe for copyrights than it is here. Here, we explained --

THE COURT: You explained?

THE WITNESS: Yes, sir.

THE COURT: What did you say about copyright

costs in the United States?

THE WITNESS: In America you can negotiate a rate of from two cents down; in England it is a fixed rate set by PRS based on the selling price of the album.

THE COURT: Did you estimate the total cost of copyright costs for the album in the United States?

THE WITNESS: Yes, sir.

THE COURT: What was that estimate?

Did you do it per record?

THE WITNESS: About 18 cents, 18 to 24 cents.

THE COURT: 18 cents?

THE WITNESS: 18 to 24 cents.

THE COURT: 18 to 24 cents?

THE WITNESS: Yes.

THE COURT: Did you estimate any other costs?

THE WITNESS: In the United States we said what a pressing was.

THE COURT: What did you estimate for that?

THE WITNESS: If it was mail order it would run about 37 cents; if it was retail fulfillment it would be about 39.

THE COURT: Did you estimate any other costs?

THE WITNESS: We discussed the advertising in the United States based on retail fulfillment and on mail

order, and then there was a remark made by me in England it is different, there is only one set up that you can advertise in, and it is a lot higher than it is here,

THE COURT: Did you estimate the advertising costs per record?

THE WITNESS: On retail fulfillment, yes, and on mail order.

THE COURT: What figures did you estimate?

THE WITNESS: It is completely different than that sheet.

THE COURT: I am not asking that. I am asking what your memory was of the conversation.

THE WITNESS: My figures on retail fulfillment was that we set our budgets in America based on not the retail selling price, but on the wholesale selling price. So we set it at 25 per cent of the wholesale selling price less 35 per cent, which we took into account as the average return. So it would be 25 per cent of 60 per cent of the wholesale selling price, which is close to the 60 or 70 cents. Plus, there is another unknown quantity in there, that when You get reorders from the various stores it brings the advertising costs down even lower.

THE COURT: Was this something that you

explained to these gentlemen at that meeting?

THE WITNESS: Yes, sir.

THE COURT: Did you as a result end up with a figure of so many cents that would have to come out of the record to take care of advertising costs?

THE WITNESS: We discussed it. It would be about 60 or 70 cents for retail fulfillment. We like to pay about $1.25 on mail order or less, or even a little bit more is okay on the direct mail, and in England, and my comment was it is much more expensive there because there is only two or three different TV stations that you can go to advertise, and there is no mail order in England.

THE COURT: Did you estimate any other costs besides the ones you were talking about just now?

THE WITNESS: Yes, that dollar is there on that sheet of paper --

THE COURT: Look, I am not asking you to comment on that sheet of paper. I am asking for your memory of what was discussed at that meeting.

THE WITNESS: We discussed the copyright; we discussed the pressing; we discussed the jacket.

THE COURT: What you have told me, the figures you have given me so far -- let us have this clear -- you have given me figures for copyright, for obtaining copyright

in the United States, 18 to 24 cents, the pressing costs you have given me, the alternative figures of 37 and 39 cents, advertising you have given me alternative figures of a dollar and a quarter or 60 to 70 cents --

THE WITNESS: Or possibly less even.

THE COURT: Now, what other costs, if any, were discussed at that meeting?

THE WITNESS: Royalties to John Lennon.

THE COURT: Give me just a minute. I am trying to find something.

All right, you say royalties to John Lennon?

THE WITNESS: Yes.

THE COURT: What was said about that?

THE WITNESS: That that would remain at 12 per cent in England, why should he take less in England.

THE COURT: The 12 per cent was to be 12 per cent of what?

THE WITNESS: Retail selling price, your Honor.

THE COURT: 12 per cent of retail selling price?

THE WITNESS: Right.

THE COURT: Was that apply in the United States or England or both?

THE WITNESS: Both, sir. He would not take

less in England. That is his royalty rate wherever the package goes. We were talking about the possible joint venture in England.

THE COURT: Was there anything said about the cost of the jacket?

THE WITNESS: Yes, sir.

THE COURT: What was said about that?

THE WITNESS: Between 10 and 15 cents; 10 would be closer to it when we usually make a mail order jacket.

THE COURT: Any other costs estimated?

THE WITNESS: We discussed the retail fulfillment freight.

THE COURT: What was said about that?

THE WITNESS: Once again it was approximately 3 per cent of the wholesale price, not of the retail price.

THE COURT: Did you discuss a figure?

THE WITNESS: That would be running 8 to 9 cents a record on the retail fulfillment; it had to make a circle.

THE COURT: All right.

THE WITNESS: Also, we discussed that the figures change when it is mail order in comparison to

retail, that we drop the stores for their $1.25, and then the cost becomes about 60 cents for the fulfillment, and you eliminate from between $1.25 and $1.50.

THE COURT: I am not with you. Again, what was said. We are talking about the amount that the store would take on a retail fulfillment sale.

THE WITNESS: That is correct.

THE COURT: What was said about that, about the amount the store would take?

THE WITNESS: 25 to 30.

THE COURT: Cents or per cent?

THE WITNESS: Of the markdown. It is a $5 album, we will sell it to most chains for $3.75, $3.73.

THE COURT: So they would have a gross profit of the difference?

THE WITNESS: 25 per cent.

THE COURT: So $4.98 less $3.75?

THE WITNESS: About a dollar and a quarter. I think $3.73 would be more accurate.

THE COURT: $3.73?

THE WITNESS: Yes.

THE COURT: So they would get $1.25 out of it?

THE WITNESS: Yes, sir.

THE COURT: Was anything said about the amount

of profit that you would make?

THE WITNESS: Never, only in the context of when we discussed the joint venture, your Honor, I said I was not interested in the joint venture with EMI as when I licensed stuff over to Europe I usually make a dollar. It would be absolutely ridiculous to even think a manufacturer in the United States would be guaranteed a profit on making a record in the United States. It has never happened In the history of the business.

THE COURT: So you are saying that you did not specify any profit that you would take?

THE WITNESS: In the United States. In the joint venture thing the dollar did come up, then I would make deals in Europe and lease other people, I usually make a dollar. Also, that was discussed in the European situation, that they charge a lot more in England and Germany for records. It would not be $4.98 in England or Germany; they usually get a dollar or two more for each record. But the joint venture, I told them I was not interested, and that dollar is in the context of the joint venture, and not as a domestic sales, because it is impossible to make a deal where the record company is guaranteed to make a dollar.

THE COURT: Can you give me a minute to do some

adding.

If I took the figures, the lowest figures you gave me all the way through, and I am taking 18 cents for copyright costs, 37 cents for mail order pressing, 60 cent for retail fulfillment advertising, 60 cents for John Lennon royalties, 10 cents for jacket, 8 cents for freight, and .20 for the stores --

THE WITNESS: I think we are forgetting AFM costs.

THE COURT: What was that?

THE WITNESS: About 6 cents.

MR. SCHURTMAN: Your Honor, I believe the witness interrupted you when you read him the last two figures.

Could you read them to him again?

THE COURT: I will read them all the way down again. You have got to be concise. Let us take the retail fulfillment situation:

18 cents copyright, retail fulfillment pressing costs, 39 cents; retail fulfillment advertising, 60 cents, John Lennon royalty, 60 cents; jacket, 10 cents; freight, 8 cents; store, $1.25; and then we are going to add 6 cent for AFM costs.

I get $3.26 as the total of all those cosgs.

Did you work out there any idea of totals? Did you write things down and add them up or didn't you?

THE WITNESS: We wrote down various costs, but they were intermingled. We were talking about foreign, about the deal of a joint venture, and compared it to local operations here; there were three sets of figures basically discussed.

THE COURT: What were the three sets?

THE WITNESS: The mail order in the United States, the retail fulfillment in the United States, and comparing it to what would happen in the foreign if we did a joint venture.

THE COURT: What was the purpose of going through all these figures?

THE WITNESS: The meeting started basically, as I said, on the other subject of surplus merchandise from Apple. Then they wanted to talk about a joint venture.

Now, the joint venture, when we discussed the joint venture, I told them I really was not interested, and we started doing some figures on the joint venture. In the course of doing figures for the joint venture, your Honor, we did figures for the domestic sales to try to compare, because some of the figures I was not familiar

with in Europe. The figures would be different, like the copyrights is a different item in Europe; the TV is different in Europe; I am not sure how retail stores work in Europe, but I do know they charge a little more money. The dollar on that sheet of paper --

(Continued on next page.)

THE COURT: I am not asking for a comment on that.

A I'm sorry. We were basically tlaking about three variables, trying to arrive at what they could talk me into doing a joint venture with EMI that it would make their role easier to get their permission.

If I could get that joint venture with EMI that's what they were approaching me on.

THE COURT: Did you work up a group of figures about a European deal?

A Yes, that was a lot of --

THE COURT: You did?

THE WITNESS: Yes, sir.

THE COURT: Who worked those up?

THE WITNESS: We did it jointly.

THE COURT: Do you remember how those came out or what those figures were?

THE WITNESS: Approximately, your Honor, I do remember. But there are some guesses in there because I wasn't familiar with all the items that were involved in the foreign operation.

THE COURT: You go down. What was the set of figures on the European joint venture?

THE WITNESS: The pressing costs were higher

in Europe.

I think we said they might be as much as ten cents higher.

THE COURT: All right.

THE WITNESS: Advertising was higher. The copyright is a fixed rate. I didn't know exactly what it was but it is a fixed rate set by law that you have to pay.

THE COURT: What did you estimate?

THE WITNESS: I don't know.

THE COURT: You felt it would be higher?

THE WITNESS: Yes, it is fixed by law that you pay --

THE COURT: All right. Now,how about --

THE WITNESS: Jackets are higher in Europe.

THE COURT: And freight?

THE WITNESS: I imagine it is the same. Freight maybe was a little higher but I don't think so.

THE COURT: How about the markup of the store?

THE WITNESS: It might be higher in Europe. Usually stores in Europe work on higher markups.

THE COURT: Didn't you say though that they --

THE WITNESS: They got a higher price there too.

THE COURT: The retail price is higher?

THE WITNESS: Yes, I believe the retail price is higher in Europe.

THE COURT: Did you come out a figure after that would be available to you after all costs and royalties and so forth?

THE WITNESS: About 23 cents. That's where that figure comes. I was going to wind up with 23 cents and then I said I usually get a dollar, I've got licenses I made for Ronco and other people of the world and I usually make a buck on a package overseas that's where the dollar comes in.

THE COURT: What do you usually make in the United States?

THE WITNESS: On a very successful package?

THE COURT: Well, successful, you expected this to be successful.

THE WITNESS: I would estimate I would make between a $1.60 and $2, if the re-orders were very heavy in the stores I would go up even more. I think $1.80 to $2 in the ballpark, it could go up a little and it could go down a little.

THE COURT: Now, what was the purpose of going through -- you said there were two other sets of figures, mail order US one, retail, fulfillment US?

THE WITNESS: That is correct, sir.

THE COURT: Do you recall how you came out on the mail order US as to whatyou would make?

THE WITNESS: Your Honor, we didn't do the mail order US to see what I came out with or what they came out with. That really came up as we were discussing what we were trying to arrive at as the joint venture as part of it. It didn't come down to see what you will make and what I will make.

THE COURT: In other words you didn't get a complete set of US figures or two complete sets of US figures with the profit?

THE WITNESS: I see it was in the context, Harold Seider to me, you told me it was 25 percent advertising, but it might be different in England. We discussed that a bit. It wasn't done, the figures of US in mail order and retail came out as a part of the discussion of the joint venture, your Honor.

THE COURT: All right. Okay, Mr. Bergen.

MR. BERGEN: Your Honor, I would like now to read into the record, because I think it would be very helpful to your Honor Mr. Levy's testimony on his deposition about that meeting and about those figures.

Now, I have one problem, it is about seven or

eight pages but I think it would be very helpful for your Honor to clarify.

THE COURT: Sure.

MR. BERGEN: It starts at --

THE COURT: If it clarifies read it. If it just quibbles, if there are minor semantic differences it doesn't help.

MR. BERGEN: What I am reading has no reference to foreign sales at all.

THE COURT: Just one moment. If I could just make sure I understand, Mr. Levy.

What you are saying to me, you confirm or correct me. That when you were discussing the figures about costs and royalties for US distribution, you only discussed individually attempts as a basis for adjusting and arriving at the European figures, is that right?

THE WITNESS: That is correct, sir.

THE COURT: And that you added up the European figures to determine what your profit would be but you did not thus add up the US figures, is that correct?

THE WITNESS: Yes.

MR. BERGEN: I would also like to note, your Honor, the 23 cents that Mr. Levy has referred to, according to his testimony was European.

jpbr 6 Levy-cross

THE COURT: I heard that.

Let me complete my notes and then you read the deposition. Okay.

MR. BERGEN: Just before I read it, your Honor:

Q Isn't it a fact, Mr. Levy, that all of the facts discussed at the Graham meeting related to the US sales?

A No, sir.

Q Isn't it a fact that you testified that the figures were European because you were afraid that the figures otherwise made no sense and because without sensible figures there couldn't be any deal.

MR. SCHURTMAN: When?

THE COURT: I don't even understand this. Read the deposition.

MR. BERGEN: Start at page 358.

"Q Do you recall a dinner onor about November 18, 1974 at the Cavallero attended by you and Mr. Seider and a Mr. Graham?

"A I am trying to place this Mr. Graham. His name keeps popping up but I can't really place him. If you tell me who he is.

"Q Would it refresh your recollection if I would say he was an attorney with the Marshall, Bratter firm?

"A Not really, no.

"Q Michael Graham?

"A It is possible.

"Q Do you recall a meeting on or about November 18, 1974 at the Club Cavallero with Mr. Sider where different figures were discuss in relation tothis album?

"A It is possible that took place, too. We disdussed figures at various times.

"Q Do you recall for example an advertising price on a 4.98 album of a $1.25 veing discussed?

"A That would have been exactly what I would have said if we discussed it because as I said it is about 25 percent of the retail selling price on the mail order side.

"Q Doyou recall a figure for manufacturing cost of 40 cents?

"A That would be the figure, 39 to 40 cents to manufacture a record.

"Q Do you recall a figure for the jacket of 15 cents per album?

"A It would run between 10 and 15.

"Q Do you recall a figure as profit for the store or fulfillment center as you have called them of a $1.50 per album?

"A To the store?

"Q Yes.

"A On a 4.98?

"Q Yes.

"A Certain stores would get $1.50 as I have testified earlier, the ones with the 30 percent deal but it would be a 25 percent deal for other stores.

"Q Do you recall a figure for mechanical royalties of 24 cents per album being discussed?

"A Yes.

"Q Do you recall AF of M at 1-1/2 percent, a figure of 6 cents per album?

"A The American Federation of Musicians, yes.

"Q Do you recall freight at 3 percent coming to 15 cents per album?

"A Yes, that would be the figure.

"Q Do you recall a figure as royalty or a profit to you of $1 per album being discussed?

"A No, I would figure on making more than that but on the retail side that would be possibly $1 per album."

THE COURT: Read the last again.

Q "Q Do you recall a figure as royalty for a profit to you as a dollar per album being discussed?

"A No. I would figure on making more than that but on the retail side that would be possibly $1 per album.

"Q If that is a minimum, what would be the

maximum?

"A On the mail order side it would be higher because you have added 30 percent, 25 to 30 percent more on the ols sold direct mail.

"Q That would come to what instead of a dollar?

"A You will have an extra around $1.50 would be going to the store. On mail order your additional costs would be about 30 cents for the fulfillment center and about 20 cents some order for stamps. So you would come to another half off the dollar. So it would be closer to a $2 profit on the mail order side.

"Q Do you remember a figure of royalty for Mr. Lennon of 23 cents being discussed?

"A No, sir.

"Q What would you figure insofar as the mail order sale as Mr. Lennon's --"

THE COURT: Read the last again.

Q "Q Do you remember a figure of royalty for Mr. Lennon of 23 cents being discussed?

"A No, sir.

"Q What would you figure insofar as the mail order sales as Mr. Lennon's royalty?

"A No, I think in all discussions that we had we were talking 12 percent for Mr. Lennon.

"Q Which would be what?

"A On a $5, close to 60 cents.

"Q Mr. Levy, if you add up $1.25 for advertising, 40 cents for manufacturing, 15 cents for the jacket, $1.50 per profit to the store, 24 cents tor mechanical royalties, 6 cents for A.F. of M, 15 cents for freight, $1 for you in terms of sales through stores and 60 cents for Mr. Lennon, I come to $5.35 cents.

"A Well, I think you have got -- I think when I explained it to you yesterday, the $1.25 is not the way I explained the advertising budget. I think yesterday in my testimony I told you that we take 65 percent of what we bill out and then charge 25 percent. So I thinkyou are playing with the numbers a bit.

"Q Well, since the difference seems to be 37 cents, I take it that advertising expenses, you would figure closer to 88 cents rather than $1.25?

"A On the retail level?

"Q On the retail level.

"A As I explained yesterday in my testimony?

"Q In terms of mail order,you would have approximately $1.25 advertising?

"A Well, go ahead, finish it your way.

"Q 40 cents manufacturing, 15 cents jacket,

$1.50 profit to the store?

"A No.

"MR. BERGEN: $2 profit to Mr. Levy.

"THE WITNESS: There is no store involved with $1.50.

"MR. PRETTYMAN: That is the one that comes out, I am sorry.

"MR. BERGEN: So, you have $2 there.

"MR. PRETTYMAN: Right.

"Q Let me go back. Advertising $1.25, manufacturing 40 cents, jacket 15 cents, mechanical royalties 4 cents, A.F. of M sixcents, freight 15 cents.

"A No freight.

"Q No freight?

"A That is right.

"Q Take out freight?

"A Yes.

"Q Postage, 20 cents?

"A And fulfillment about 30 cents.

"Q Fulfillment 30 cents?

"A Yes.

"Q Levy's profit, $2?

"A Yes.

"Q And 60 cents to Mr. Lennon?

"A Yes.

"Q My addition is undoubtedly horrible but I get $5.20.

"MR. KANZER: The numbers are whatever they are.

"A When I say a $2 profit, let me clarify that. We have CPOs which is cost per order and we would budget as much as 25 percent. That is our top figure. But I have enjoyed packages that sold for as high as $8.98 where I was prepared to spend $2 and change for CPO and it cost me 80 cents. So that's a variable there that I think I would have probably made even more than $2 a package on the mail order because with an artist like Lennon and the nostalgia value of this I might have bought this on a CPO per order at way under $1.25. That is the top amount that we like to spend. It is a variable. WE have many orders that cost us much less when it is a hot package. It would run much less on a hot package.

"Q Are the figures that we have just discussed here, Mr. Levy, for both mail order an retail sales essentially the deal that you said that you reached back on October 7th or 8th with Mr. Lennon and Mr. Seider?

"A Well, we ran down some figures. Basically we discussed some of these figures that we are happy to spend

up to 25 percent in advertising an all that.

"Q Yes.

"A There is a few pennies difference there too. We rounded it out in the discussion because pressing at that time was running about 39. There is also two cents savings on a pressing that is for mail order against a pressing that is for the store. That is because you don't poly.

Q What does that mean?

"A You drop that wrapping around because it is going out direct mail. You don't poly the record because -- it costs two cents a record. There is variables. A jacket would run from 8 to 15 cents. There is a variable in that too.

"Q Yes?

"A The pressings. If they were large orders being placed, dropped to 37, if you were ordering 100,000 at a shot, this is outside. But there is inside numbers too. But that is the ballpark.

"Q The only point I am trying to make is that this is not a revision of the prior deal?

"A That is right.

"Q This is essentially the deal that you had reached in the October 7th or 8th meeting?

"A Yes. Basically. I give them some insight what we would like to spend under costs and they knew the costs too, you know.

"Q In other words, there are no categories that are inserted here which are different from what you had understood before or there are no categories that are left out of here which you had agreed to before?

"A There are variables. In other words, even the publishing when it was put down, that was approximately 24 cents for 15 songs. If we were successful in really negotiating, it might have been 18 cents. It might have been 30. I doubt it very much because we are good negotiators on copyright rates especially if we are prepared to walk into some publishers. We will guarantee you two $300,000 a unit and we will guarantee a penny or a quarter of a penny whenwe are talking about it.

"Q . Youare talking about variables within figures of categories that we have listed. I am asking whether there are any categories which had previously been in the deal and which were left out here?

Q No. Off the top of my head, no."

I believe that's it. There is some additional talk about any reference to EMI.

THE COURT: Anything else in the cross

examination of Mr. Levy?

MR. BERGEN: Yes, I have just a few more questions.

THE COURT: Okay.

BY MR. BERGEN:

Q Mr. Levy, I believe you testified that this album could have sold 2 million units, is that correct?

A Yes, sir.

Q And that's by mail order in the U.S.?

A It could have. I don't think I testified it would have sold 2 million by mail order in the U.S., Mr. Bergen. I think I said it could have sold 2 million.

Q I want to read you from your deposition at page 368:

"Q I take it you are referring only to mail order there?

"A This album could have done 2 million in mail order, I believe."

Does that refresh your recollection?

A Yes, that's what I just said.

THE COURT: Is this the deposition?

MR. BERGEN: Yes, your Honor.

THE COURT: Go ahead.

"Q Now, how long would that mail order campaign

take to sell the 2 million?

"A It could take six months, eight months, five months.

"Q Again on your deposition, Mr. Levy, you testified.

"A No, mail order grinds to a stp. You burn yourself out in mail order within three to four months absolutely."

Page 373. "Does that refresh your recollection?

"A Yes.

"Q You'd sell the 2 million in three to four months?

"A If you do 2 million, it wouldn't drop dead in three to four months. It would take a little longer. If you would do 2 million of an album it would take longer than three or four months.

"Q How muchmore?

"A A couple of months more.

"Q Now, now many units did you expect to sell every week on this album?

"A I don't think I ever broke it up in my mind by the week, Mr. Bergen."

I refer you again to page 272 where you answered:

"A In other words, if we are running it at a very

low cost per order we would be doing a volume of, oh, 30, 40,000 pieces a week. You know, maybe even more, we would stay with it right there and get the maximum profit out of it."

Do you recall that?

A Yes.

Q So,you would be selling a maximumon this album of 40,000 pieces a week?

A No, I wouldn't say it was a maximum, Mr. Bergen. If it really took off there is no limit to what a maximumcould be. In the record business, we're well aware that if a record takes off, the numbers just go crazy

MR. SCHURTMAN: I'm looking at this deposition and the last few excerpts were read out of context because in the questions they were swtiching back and forth from retail fulfillment to mail order.

THE COURT: You read the whole thing.

MR. SCHURTMAN: Pardon?

THE COURT:Read the whole thing.

MR. SCHURTMAN: It will take a while,your Honor.

MR.GRUMBACH: I think line 13 makes it clear that it is mail order.

MR. SCHURTMAN: Let me start here.

"Q As I understand it you fully intended as I heard you describe"--

MR. BERGEN: What page?

MR. SCHURTMAN: 369.

"To place the package in retail fulfillment centers contemporaneously with the television advertising?

"A Does that mean simultaneously?

"Q Yes.

"A No, we would never do that.

"Q Explain that to me, what is the time lag?

"A No, if we get a successful mail order package, we would run it out as a mail order package.

"Q For how long?

"A Oh, it wouldn't take more than five months to run the whole country on the mail order pakcage.

"Q During the five months it would not appear in any retail fulfillment center?

"A It would depend on sales. Yes, it probably wouldn't.

"Q Then at the end of the five months, you would then place in the retail fulfillment center?

"A Depending on how well we did. If we felt we had some more mileage we would and that would take approximately 12 weeks to run that out.

"Q The thing that confuses me is, I thought you testified that the thing that brought people into the retail fulfillment center to buy the album was the television advertising?

"A You are absolutely right. I testified to that when I was talking about fiving the store a smaller markup and that's why the stores accepted a smaller markup of that. But as a packaging company, we always have flexibility if the profit is in which I'm sure you can understand. As a company we would go for the higher profit. And if we could run this through as a mail order item as Brookville ran the Presley item, to use that as an example, I know I'm beating a dead horse with that, they ran that as a mail order package and it ran close to 2 million and it didnt' go retail. And I'm sure I would have the option as a businessman and I'm sure John would go for it. If we ran it through as a package, I would be very happy with the package.

"Q What did you discuss with him, not what might have happened but what your plans were in regard to this particular album?

"A I don't think we got into that point. I had both options. We discussed the retail fulfillment centers if it had to be done but the first push would be

mail order because the profit margin is much higher than it is in the store sales.

"Q Would it be fair to say that if the sales were going well through mail order, thatyou would hold back on putting it into retail fulfillment centers, but on the other hand if the album was not going well, you might put it into the retail fulfillment centers at an earlier date?

"A No. It wouldn't be a question of doing well or not. It would be a CPO, cost per order.

"Q I see.

"A That would give us the insight on that. It would be experience, in other words, if we are running it at a very low cost period, we would be doing a volume of, oh, an album like this, 30, 40,000 pieces a week. You know, maybe even more.We would stay with it right there and get the maximum profit out of it.

"Q Out of the mail order?

"A Of course. It would be a wise thing.

"Q On the other hand, if you were not getting that and you were getting substantially less, you then might put it into the retail fulfillment centers?

"A Yes, we hoped to have both options to do that.

"Q These were not details that you had discussed with Lennon?

"A No. We discussed on the basis that it would be mail order and that we could also go retail fulfillment. We discussed that. I don't think I even discussed that to a big degree with Lennon. I did more of that with Seider.

"Q Was it at least made clear to either Lennon or Seider that at some point the album would go into retail fulfillment centers?

"A I would say yes that we had the option to do that. We discussed it.

"Q Did you intend to do it?

"A It would depend on the numbers.

"Q No, at some point at the end of mail order push when it came?

"A You mean in four months?

"Q Four months, five months, whenever it came?

"A No. Mail order grinds to a stop. You burn yourself out in mail order. Within three to four months, absolutely.

"Q At the end of that period, at least, you did intend to put the album into retail fulfillment centers?

"A Yes, if there was more into it, sure. We would have but it would depend. If, here would be my decision. If we did 2 million in mail order in the period of three or four months, we had a winning package and that

would be it. There would be a question mark as to whether we would put it into retail fulfillment centers or what your sales through it might be. You may have saturated the market place that your sales through it would not be there. You could get hurt in retail fulfillment. If I did 2 million pieces or a million and a half or a decent number like that fast, that would probably be where I would stop.

"Q In any event, that was a decision which was open to you and which you would make later depending on your CPO and all of that?

"A Right. It is also possible that we would have run on the package for two weeks mail order and no CPO and had gone retail fulfillment centers almost immediately and be through with thw whole package in four months.

"Q That was a possibility?

"A Yes, sure, that is right. It was."

THE COURT: Whose questions are these?

MR. SCHURTMAN: I believe it was Mr. Prettyman in the deposition. I have gone through page 374 of the deposition. The same subject was covered almost ad nauseum in other portions of the depositon.

MR. BERGEN: My only point,your Honor, is that Mr. Levy has testified that he would be doing an album, a number of 30 to 40,000 pieces a week. I submit, when you

divide that into two million it comes out to fifty weeks. In order to sell his 2 million, he would have had to sell like in four to five months, he would have had to sell 125,000 albums a week. That's my whole point of this. I have one more question.

THE COURT: All right.

Q At the end of the meeting on October 8th, Mr. Levy, did you feel you had a final business agreement and contract with Mr. Lennon?

A Would you want to read that gain.

(Read.)

A Yes, we had a deal.

Q You had a deal in the sense that all of the terms and conditions of the deal related to this album were decided upon at that meeting?

A We had a deal.

MR. BERGEN: Read it back.

(Read.)

Q So there were no loose ends left over?

A There would be some boiler plate stuff that would come up, but basically we had a deal.

THE COURT: Are you finished?

MR. BERGEN: I want to read from his deposition. Page 122:

"Q So there were no loose ends left off?

"A That's correct.

"Q Now at the conclusion of themeeting, Mr. Levy, did you anticipate that the deal which you felt you had reached would be reduced to writing at a subsequent date?

"A Yes. At the conclusion -- maybe not immediately I didn't think about it but I knew we discussed it later that it would be reduced to writing."

MR. BERGEN: I read you from page 185 of your deposition:

"Q At the conclusion of that meeting, did you anticipate that the deal which you felt you had reached would be reduced to writing at a subsequent date?

"A Not really, no."

I have no further questions.

THE COURT: All right. 2:15.

(Luncheon recess.)

mms

AFTERNOON SESSION

(2.25 p.m.)

M O R R I S L E V Y , resumed.

THE COURT: Is there any other cross of Mr. Levy?

MR. PRETTYMAN: I have not had any.

MR. GRUMBACH: Nor have I.

THE COURT: I thought it was all covered by your friend.

MR. PRETTYMAN: I saw that hopeful look on your face.

First, I do have the general memorandum that I referred to this morning, and I am giving a copy to Mr. Schurtman and one to you, sir. I think it would be helpful in terms of the material that we gave you.

CROSS EXAMINATION

BY MR. PRETTYMAN:

Q I am Barrett Prettyman, as you know.

As I understand it, both from some things that you said and from the statement that Mr. Schurtman made yesterday, in November, right around the time that you received the tape, you still had some question about permission on retail fulfillment centers, you still had some question about foreign sales, but as I understand your

position, you had no question about [illegible] right to sell the Lennon album through mail order TV in the United States?

A That is basically it, yes.

Q Did you have any question about that at all?

A About the mail order? No, sir.

Q On mail order you knew you had the rights and there was no question about that? Whatever permission you needed you had?

A On the mail order?

Q Mail order only and the United States only.

A And the period you are talking about?

Q After the October 8th meeting?

A Yes.

Q And in mid-Novembe[illegible] --

A Some time I think I testified, that some time in November Mr. Seider told me it was okay to go ahead with the retail fulfillment. I think that is in my earlier testimony.

Q Do you recall whether that was before or after you received the tape?

A I could not be sure.

Q So on or about November 14 you received the tape which you treated as a master tape, and you said that Mr. Lennon gave it to you, he was through with it,

and to go ahead and use it?

MR. SCHURTMAN: I object to the date, your Honor.

THE COURT: What is the objection on the date?

MR. SCHURTMAN: The witness has not testified it was on the 14th.

THE COURT: You are talking about the date he received the tape?

MR. PRETTYMAN: Mid-November.

THE WITNESS: I think my testimony was that I believed it was the night that the engineer was in there with Mr. Lennon.

Q Whatever date it was?

A Yes, sir.

Q And that was the master recording and Mr. Lennon said, "It is yours; I am through with it; go ahead and put out the album?"

Is that correct?

A No, he didn't say, "Go ahead and put out the album." He said, "It is yours; I never want to hear it again; it is finally finished." He didn't say, "Go ahead and put out the album."

Q You interpreted that as the end of what he would have to do and that you now had permission to proceed?

A Yes.

Q He didn't attach any conditions to it?

A No, sir.

Q Now, at that point, sir, you put those tapes away, didn't you?

A Yes, sir.

Q Why did you put them away for ten weeks?

A I don't believe I testified I put them away for ten weeks.

Q Well, I said ten weeks, between November 14 and January 30. But let us say between Mid-November and the end of January, why did you put the tapes away for that period of time?

A Well, it happens that way with tapes, Mr. Prettyman. You put them away and then you start doing the other work that has to be done --

Q This was your normal practice?

MR. SCHURTMAN: The witness was interrupted in the middle of the sentence.

A -- that is the normal way, Mr. Prettyman, that you put it away and start to work on your concepts for cover and story boards, or how you are going to do your commercials, or various things that you are going to do.

Q So that this delay, would you say, was a normal

delay from the time that you normally receive a master tape until the time that you do the things which you describe you did in this case after January 30?

A No, sir, I could not call it a normal delay. There were other circumstances here, Mr. Prettymani

Q That is what I am trying to find out.

What was the cause of your delay?

A When we got the tapes and I talked to John, we were going to go down to Florida, we were going to talk about the commercials then. I had discussed the written agreement with Mr. Seider. He said it was for the benefit of John, in November he had told me he could not tell me why, but it was for the benefit of John to delay entering into a formal agreement because it meant quite a bit to him. When I pressed him on it he said, "I can't tell you about that now," which I respected and accepted as such. Also, we were going to work on the commercial and possibly some other ideas with John down in Florida. John didn't like to go to anybody's office to work on things. We said we would run it down there and I would extend that courtesy to an artist of Mr. Lennon's caliber if his attorney said to wait.

Q Are you testifying here that part of the delay or the entire delay was in part due to the fact that

you had not received a written agreement?

A No, sir, no.

Q Was the written agreement in any way related to the delay between the middle of November and the end of January when you began doing your work?

A No, Mr. Prettyman, I am not sure if those tapes came in November or the beginning of December. My testimony is I got the tapes the evening that the engineer and his wife came in, and up until yesterday I was not sure of that evening. Yesterday when it was one of your witnesses who testifeied, I believe that evening was pinned down to December 3rd.

Q So you now think you got the tape on December 3rd?

A My recollection is 4that is the night I got the tape. I think I testified to that earlier.

Q Now, what is the reason in your own mind, sir -- and that is what I am trying to pin down -- what was the reason for the delay, the two-month delay between --

A Well --

Q May I just finish my question?

A Yes.

Q -- between December 3rd and the end of January, when you suddenly went into a flurry of activity in putting

this album out?

A We pinned it down to December 3rd, but by December 12th or 13th I had already left for Florida planning to meet Mr. Lennon there on either the 19th -- I believe it was on the 19th of December. We were going to work on it. My return from Florida was around the 6th or 7th of January. And some work was done in that interim period.

Q What was that work?

A The story board, which would be the first step, that you would start to lay out. That is the longest part of the operation, would be getting the commercial done.

Q Mr. Levy, did you not testify in your deposition that it is your normal practice immediately upon the receipt of master tapes to get in your art work, which normally takes three to four weeks?

A Yes.

Q Is it not true that normally your TV commercial for a TV package like this is done several months before the release of the album?

A That is correct.

Q And, in fact, your commercial is done during the same three to four weeks that your art work is being

done normally?

A If everything is normal, that is the timetable we would like to follow.

Q And, normally, you would be on the market with an album of this type four weeks after the receipt of this tapek four to six weeks, Mr. Levy?

A If everything is normal, that is the ultimate for us.

Q Precisely. What was it that made this an abnormal situation if you had all of the rights that you needed to proceed with TV mail order, which I understand from your testimony is the most lucrative part of the deal?

A Well, we had an artist of the stature of John Lennon. I certainly intended and would have if I could have done the commercial with his advice, his feelings on creating it. I certainly would have used th picture of his choice, which he told me about, the picture that he wanted to get from Germany. I certainly would have used that picture.

Q Were you waiting for the picture from Germany?

A The picture from Germany was mentioned the first time, I believe, at the meeting after the weekend that he had spent with Mick Jagger.

Q Let me just have one question more. Is it not a fact that that delay was caused by the fact that you felt you did not have permission to proceed with this album in any fashion?

A No.

Q And it was not until January 30, when you got the so-called turndown from Mr. Seider when you decided to go ahead without permission and the flurry and activity was the result of that decision? Is that not correct, sir?

A I believe you asked me two questions.

The first answer is no, sir, on the part of that delaying me. The second --

Could you read the second question back?

(Question read.)

THE WITNESS: Have I answered it?

THE COURT: It seems to me this is argument.

Q Mr. Levy, you testified at one point that at the October 8th meeting Mr. Seider made a comment about the fact that a lot of money had already been spent for the tapes and that Mr. Lennon then said that Capitol would be happy to get their money back, that that is one of the things he likes about the deal, that everybody would be happy and that Capitol could get its money back?

A Yes, sir.

Q And I believe you joined in that how you thought everybody would be happy, including Caitol, because they were getting their money back?

Can you explain to us how under the deal that you outlined Capitol was going to get its money back?

A They would be getting something from the sales and everything. Normally, when an artist has a contract all recording costs come back from his royalties before he gets his royalties. In other words, if I was an artist and I expended $50,000 to make a LP, Mr. Prettyman, that is charged to my account. As that LP starts to sell, the record company that lays out that money gets it off the top from the royalties. That made a lot of sense to me and that is a basic deal the recording business.

Q So that, in other words, out of Mr. Lennon's 12 per cent, if I understand you correctly, Mr. Lennon would only have to pay Mr. Spector the 3 per cent royalty that you have referred to and not only have to pay Mr. Spector whatever recording costs he had undertaken, but that he would also have to pay all additional recording costs that Capitol had undertaken?

A Normally.

Q I am asking about your deal?

A Mr. Lennon would have to pay back that recording cost right away, and it is a cumulative thing. If during the course of a year an artist spends a hundred thousand dollars record, a hundred thousand dollars and by that artist would go toward the recording cost, be it that particular album or be it another album. In the long run Capitol would have gotten its money back either way, I believe.

THE COURT: Did you have any understanding here as to how Capitol would get its cost back in this case?

THE WITNESS: It was not explained to me how it would happen, no.

THE COURT: Did you have any understanding of your own judgment or whatever on that subject?

THE WITNESS: Yes, sir, that is what I was testifeying to.

THE COURT: You understood that Capitol would get its money back out of John Lennon's money?

THE WITNESS: The standard --

THE COURT: No. Did you understand that Capitol would get its money out of John Lennon's money?

THE WITNESS: Yes, sir.

THE COURT: Did you understand that Capitol would get its money first before John Lennon would be able

to keep his money?

THE WITNESS: That is the standard clause in a recording contract, that the record company advances the money to most artists for the recording costs. The first royalties owned by the sale go back to the record company. That is very standard with most artists in the entire recording industry. It was not discussed, but that is the standard clause in the recording contract.

Q Mr. Levy, are you aware, sir, that recording costs connected with Mr. Lennon's albums are not recouperable out of the royalty that he receives?

A No, sir.

Q You are not aware of that?

A No, sir.

Q Did you ask anybody at that meeting about that?

A No, sir.

Q Did the subject come up?

A No.

Q You just assumed that it would be?

A I assumed that that was a standard recording deal.

Q You were aware of what the total costs were about that time?

A I believe I was told $90,000.

Q You thought they were $90,000?

A Yes.

Q Isn't that $90,000 related solely to the recovery of the Spector tape?

A Yes.

Q Is it your understanding there were no other costs at all at that time?

A That is the cost given to me by Mr. Seider.

Q He was talking about the Spector tapes?

A Yes.

Q Those are the only costs that were mentioned?

A At the October 8th meeting?

Q Yes.

A Yes, sir.

MR. PRETTYMAN: Your Honor, I cut out so many questions I am having trouble finding the remaining ones.

THE COURT: That is time well spent.

Q When was the last board meeting of Big Seven?

A I don't know.

Q Are there any board meetings of Big Seven?

A Not in the formal sense.

Q Has there been any formal approval of the deal that you made, that you claim to have made with Mr.

Lennon by the boards of the companies?

A No, sir.

Q The companies do have boards, do they not, boards of directors?

A Yes, sir, but they are not operative in that sense on a daily basis about every contract that is made or anything like that.

Q We are talking about a contract that was made on October 8, 1974?

A The rights to make a contract go to the chief executive officer.

Q I am asking you, has the board met since October 8, 1974?

A Probably the lawyers draw up those papers that the board has met and you sign them for the annual meeting.

Q You say probably?

A Probably.

Q Now, Mr. Levy, I am a little confused on one subject, and that is a review of these contracts that EMI and Capitol had. It was, I believe, Mr. Seider's testimony that you told him at the meeting on January 30 you had, in fact, seen these contracts. Now, had you seen them by that time or is that an error that you told him?

A He is in complete error.

Q You didn't tell him that you saw those contracts?

A No.

Q And, in fact, you had not seen the contracts?

A No.

Q And, as a matter of fact you did not see the contracts until this lawsuit was filed?

A I believe so.

Q Did you ask your lawyers at any point during the interim period to look at the contracts?

THE COURT: He has testified three times he did not.

Q Now, you asked Mr. Seider, I believe, according to your testimony, for an exclusive on this record?

A Yes.

Q Did you not also tell Mr. Seider, according to your own testimony, that it would be impossible to have both of these albums, that is the Capitol album and the Roots album out on the market at the same time?

A Yes, I would have to take a beating if that happened?

Q Yes.

A I'd have to take a beating if that happened.

Q You recognized the reverse side of that coin, did you not, Mr. Levy?

A No, sir.

Q In other words it wouldn't harm Capitol at all to have your album out at the same time this album was out?

A If I was advertising on television at the same time, I think they would benefit by it. That's why I think it would hurt me.

THE COURT: I don't understand, were you assuming that Capitol would be marketing the album through normal channels or commercial channels at the same time as your mail order campaign was going on?

A No, absolutely not. He asked a hypothetical question now. I've testified earlier that's why I explained to Seider I must have an exclusive. I think Mr. Prettyman was asking a hypothetical question.

MR. SCHURTMAN: I think Mr. Prettyman was switching his counterclaim and that's what he was driving at.

THE COURT: Just a moment. In other words, your contention is that the contract that was made on October 8th gave you the right to market this album exclusively by mail order during the time that such

mail order campaign was going on, right?

A That is correct.

THE COURT: And that neither Apple nor Capitol could market the album in any way as long as your mail order campaign was going on?

THE WITNESS: That is correct, sir.

THE COURT: Well, did you understand that Capitol had agreed to refrain from marketing an album while you were conducting your campaign?

THE WITNESS: At the October 8th meeting?

MR. PRETTYMAN: I didn't hear that.

THE COURT: Read the question back.

(Read.)

THE COURT: At any time?

THE WITNESS: At the October 8th meeting, I explained it to Mr. Seider that part of it would have to be exclusive.

THE COURT: Did somebody say yes, you have an exclusive and no one will market an album of these songs through channels of theirs while you are doing your campaign? Did somebody say that that was agreed to?

THE WITNESS: No, those specific words were not used.

THE COURT: I'm sorry, I'm not talking about

specific words. Was that agreed to in words or substance?

THE WITNESS: Substance, yes.

THE COURT: Who agreed to that?

THE WITNESS: Mr. Seider told me -- when he told me we could go ahead with the retail fulfillment some time in October and at the first meeting in substance they acted like it was understood.

THE COURT: Let's take it, the first meeting was October 8th. I don't want to create any confusion by specific words. I'm talking about what I think you are talking about, and that is the agreement, while you were having your campaign on it was exclusive?

THE WITNESS: Yes, sir.

THE COURT: That, of course, meant that neither Capitol nor Lennon could put out this album of these songs while you were doing your thing, right?

THE WITNESS: Yes.

THE COURT: Now, did somebody agree tothat in words or substance atthe October 8th meeting?

THE WITNESS: Yes.

THE COURT: Who did?

THE WITNESS: Mr. Seider and Mr. Lennon because they didn't disagree.

THE COURT: Wait a minute. Are you finished?

THE WITNESS: They didn't disagree. This is the same period we are discussing various things we disagreed on and compromised at that meeting. This is one of the things they agreed with.

THE COURT: Do you recall them saying anything that indicated that an agreement or was it just as you put it, they didn't disagree?

THE WITNESS: They didn't disagree. The assumption on my part was they understood why I said it. I went into detail also, your Honor.

THE COURT: Did you understand how they had the right to say that Capitol could not market the album?

THE WITNESS: They had reserved the mail order -- I knew they had reserved the rights, Apple had reserved the rights, your Honor. It didn't get down to the point they explained to me that Capitol could or couldn't. It didn't get into that fine point. I couldn't testify to that.

THE COURT: Did there come a later time when there was a more express agreement on this subject or not?

THE WITNESS: When Mr. Seider told me some time in November that it was okay to go ahead in America with the retail fulfillment that definitely said nobody was going to put it out and compete with retail fulfillment and mail order. Then it wouldn't make any sense for anybody to

even dream of it. Logic enters into it as much as words, in my thinking, your Honor.

THE COURT: All right, Mr. Prettyman.

Q When Mr. Seider told you it was okay to go ahead with retail fulfillment centers, did he say he had spoken with anybody at Capitol about that?

A He said he came into that condlusion and that was a week after or so that John Lennon told me he had spoken to Allen Coury of Capitol and told him about the mail order and that Coury liked the idea.

Q Coury liked the idea of mail order for Capitol, isn't that the point, Mr. Levy?

A Capitol is not in mail order, Mr. Prettyman.

Q Let me ask you this. When did this conversation with John Lennon take place?

A Some time in November, I believe it was early November.

THE COURT: What did John Lennon tell you at hat time?

A That he had spoken to Allen Coury of Capitol and he was in charge of promotion and marketing and he had told him about the idea for the TV package what we were doing and he seemed to like the idea.

Q Did Mr. Lennon tell you that Mr. Coury had given

permission on behalf of Capitol for you to proceed with your album on an exclusive basis?

A No, sir.

Q Did you receive that information from Mr. Seider that he had gotten permission from Capitol for you to proceed with your album on an exclusive basis?

A That's not the words he used either.

Q What did he say?

A He said he checked into it and he said it is okay for the retail fulfillment center.

Q Did you yourself contact anybody at Capitol to get permission for you to proceed on an exclusive basis or I'll turn the question around --

A No, I didn't contact anybody at Capitol, no, sir.

Q Let me just finish.

Did you contact anybody at Capitol to get an agreement that they would not put out their album?

A No, sir.

Q In your deposition at -- I'm sorry, in your testimony before Judge MacMahon at page 99 you said:

"Q Did you have any discussion with Mr. Seider about the impact that the Capitol record would have on the sales of the Adam VIII record?

"A I told them at the first meeting that it couldn't be done. It has to be exclusive or there was no sense doing it."

Do you recall that testimony?

A Yes, sir, that's what I said.

Q If that is true, sir, that the two albums could not be on the market at the same time, my question to you is and you remember I said isn't the other side of the coin the fact that your album would damage Capitol to the same extent or to the extent that you thought Capitol would damage you?

A My description of that, Mr. Prettyman, at the first meeting was the fact that I had to have an exclusive and if we're saturating the television tube and talking about a John Lennon Rock and Roll album and somebody has it out in normal channels, we're spending X amount of dollars, as much as 25 percent of the retail selling price and another company has got it in the stores without spending anything then it would be a disaster for us. That was at the first meeting, Mr. Prettyman.

Q Mr. Levy, was Capitol or EMI a party to the copyright infringement action?

A I don't believe so, Mr. Prettyman.

Q Was either one a party to the settlement?

A No, sir.

Q They were not in any way bound by that settlement, were they?

A No, sir.

Q They weren't required to do anything under the settlement?

A I don't believe so, no.

Q The same actually would apply to Adam VIII, isn't that true?

A Yes, sir.

Q To each of those questions?

A I think so, yes.

Q If you are confused I will go back over to them.

A Well, I think --

THE COURT: There is no contention that any of these people were so bound. I think I have heard that, Mr. Prettyman.

Q Did you learn some six months, before October 1974, that Mr. Lennon could not get the tapes back from Mr. Spector?

A Six months prior to October? That would be -- what month would that be, Mr. Prettyman?

Q That would be around May of '74?

A I heard something about it in April or May.

Q Were you told that there was quite a lot of money that was due to Spector for those tpaes?

A Yes, I believe I was.

Q Were you aware of the fact that Capitol was instrumental in getting the tapes back?

A I learned that later on, yes, sir, Mr. Prettyman.

Q Were you told who paid the cost for that?

A I believe I was.

Q What were you told?

A Capitol paid for it.

THE COURT: You have said several times that there was a point in November when Mr. Seider told you that you could have the retail fulfillment rights, something along that line, do you remember?

THE WITNESS: Yes.

THE COURT: Now, I don't recall your testimony, but I think I recall Mr. Klein's testimony to the effect that around January 29th or 30th or thereabouts, he told you that he believed that there wasn't any problem about the mail order rights but that Lennon could not give retail store rights or foreign rights. Now, is your memory in accordance with Mr. Klein's memory on

being so advised?

A That's February '75, that's after the breach, your Honor, yes.

THE COURT: Well, he placed it somewhere in a series of conversations?

THE WITNESS: That is correct, your Honor.

THE COURT: What I want to find out from you, when you issued the Roots album early February, what did you believe as far as your rights about fulfillment centers were?

THE WITNESS: I wasn't going to do it. I was going to go strictly mail order because we might have walked into a situation that could have bounced back in our face. I was going to go basically mail order.

THE COURT: You were not relying on Mr. Seider's representation made back in November, right?

THE WITNESS: At that point I wouldn't rely on any representation he made to me.

THE COURT: Okay.

Q You're suing us for violation of your world-wide rights, are you not, Mr. Levy?

A I really don't know what the complaint said, Mr. Prettyman.

Q You don't know the complaint?

A I don't understand all that legal jargon in

complaints and things. If it says that, I am.

Q One thing I'm a little confused about in your testimony.

Was it Mr. Lennon's position on October 8th as he expressed it to you now, that Capitol had no rights in the matter, or was it his position that Capitol couldn't refuse him permission to do the album for you?

A Are we talking about his attitude, Mr. Prettyman, or actual words?

Q No, what he said.

A One of the statements he made in reference to the foreign rights is we will have no problem --

Q I didn't hear you, start all over.

A One of the statements he made in reference to the foreign rights is we will have no problem with that there, my contract expires in January of '76 and they will do whatever I want. The mail order rights in the United States, I don't know if Mr. Lennon expressed an opinion or not, but the conversation -- I expressed I had some knowledge of it because of the first Beatle package I worked in 1973 with Mr. Klein. It was not disagreed by anybody at that meeting. Mr. Seider, I believe said he would check on the foreign rights and he wasn't quite sure about retail fulfillment at that point.

Q Let me read you a paragraph of your deposition that causes me the confusion.

Page 103 and this is your answer:

"A There was a discussion that mail order rights were not with Capitol. John also made a remark and said I only got a little over a year to go in my contract and they will not say no to me. But we have the rights to give you the mail order because mail order is not tied up with Capitol."

I am just trying to get straight whether he was saying you didn't have to bother woth Capitol because they didn't have any rights or whether he said to you that they are not going to refuse me permission to go ahead.

A Mr. Prettyman, I think I'm getting confused. I think that's just what I said a few minutes ago. I don't want to argue with you but I really think that's what I said.

Q He said both, in other words?

A In reference -- I believe in reference to the foreign rights, he made the remark about EMI, that there will be no problem, I've got January '76, my contract expires and in reference to the mail order rights in the United States, they agree with me about what I said about them not being with Capitol.

THE COURT: You said you didn't know about the legal things put in the complaint. Did you read the complaint when it was filed?

A Yes, sir, parts of it. I read it before I signed it. I signed it --

THE COURT: Did you approve it?

THE WITNESS: Yes, sir.

THE COURT: Did you sign it?

THE WITNESS: Yes.

THE COURT: Well, there was a State Court complaint and that would have been signed -- is that a verified complaint, verified by Mr. Levy?

MR. SCHURTMAN: That's what I'm trying to get, your Honor. I'm sorry, we don't have it with us. Was it verifieid? If it was, I'll accept it.

THE COURT: Do you have a copy?

MR. PRETTYMAN: No, I'm sorry. I was looking for something else.

MR. BERGEN: I don't believe it was verified.

MR. SCHURTMAN: I don't believe it was verified, your Honor. I think the lawyers are responsible for whatever it is in that complaint.

THE COURT: I'm asking the witness about that.

Now, did you read -- there was a complaint filed in the State Court. Did you read it?

THE WITNESS: I believe I did.

THE COURT: Did you approve it?

THE WITNESS: Yes, yes.

THE COURT: Paragraph 12 of that complaint said in October 1974 Lennon and so forth agreed -- I'm not reading the whole thing -- made an agreement for a record which would be sold as a record and tape under the title "Roots" by Big Seven or its assignee on a worldwide basis through mail order and retail fulfillment centers by means of television merchandising.

Now, did you mean at the time you approved that complaint that that was the nature of your agreement?

A I read it. The lawyers drew those thpe of things up, your Honor.

THE COURT: Did you know what the nature and terms of the agreement was when you had that complaint filed in the Supreme Court, New York County?

THE WITNESS: Basically, yes.

THE COURT: Was it the agreement or was it not the agreement as alleged in that complaint?

THE WITNESS: I don't follow you, your Honor.

THE COURT: What I am getting at, Mr. Levy, is this and I think you know, Mr. Schurtman, upon my request yesterday afternoon gave me a definition of the terms of the agreement as now contended for by the plaintiffs here. As we can all know from hearing and reading that was sharply different in certain respects in what was alleged in the complaint.

THE WITNESS: Yes, sir.

THE COURT: Now I'm not talking about a legal technicality because pleadings can be amended, but I am talking about this, Mr. Levy.

It is a question of fact as to whether there was an agreement and, if so,what the terms were, right?

THE WITNESS: That is correct, sir.

THE COURT: You say you were there and you were one of the people who made that agreement, right?

THE WITNESS: That is correct.

THE COURT: So you would tell me you know what that agreement consisted of, right?

THE WITNESS: That is correct.

THE COURT: Now, did it -- with the terms and I'm going to refer to one specific thing so you are not confused. This complaint filed in the Supreme Court and the same terminology is repeated in Federal Court

papers and so forth, it says that agreement was for a record to be sold by Big Seven on a worldwide basis through mail orders and retail fulfillment centers by means of television advertising. Your lawyer yesterday afternoon when I asked him about the terms of the contract, he said it was a contract for distribution in the United States through mail orders only. I've got the exact transcript here. Referring to page 1649:

"MR. SCHURTMAN: The agreement was that Mr. Levy's company would promote these records over television by mail order in the United States.

"It was also agreed that if EMI's consent could be obtained then they would also distribute it, Mr. Levy's company would distribute it through retail fulfillment centers or abroad."

I'm asking you, Mr. Levy, which was it, I mean , you know?

THE WITNESS: Yes, I do know.

THE COURT: What was it?

THE WITNESS: We agreed and were set on mail order in the United States. They would let me know about the retail fulfillment centers in the United States later but we were going ahead with mail order anyway. If we got EMI's permission we would go worldwide.

THE COURT: Why then did you approve a complaint to the contrary submitted to the New York Supreme Court, the Federal District Court and so forth? I don't want any comments from you, Mr. Schurtman, at the moment.

MR. SCHURTMAN: I was --

THE COURT: I'm asking the witness.

THE WITNESS: I don't know.

THE COURT: Did you read these things?

THE WITNESS: I'm not sure that I did. If I signed it, I probably read it. That's what I said earlier, I probably read it.

MR. PRETTYMAN: Can I clarify that, your Honor?

THE COURT: Yes.

Q Mr. Levy, may I refer you to page 29 in the deposition.

"Q Have you read the complaint filed in the State Court action?"

THE COURT: Where are you reading?

MR. PRETTYMAN: Pardon me?

THE COURT: Is this something I've got before me?

MR. PRETTYMAN: A deposition.

Q "Q Have you read the complaint filed in the State Court, against Capitol, EMI, Mr. Lennon, Mr. Seider and Apple Records in this case?

"A Yes, at the time of service, before service.

"Q Before it was served?

"A Yes.

"Q Before it was filed?

"A Yes.

"Q Did you approve the filing of that complaint?

"A Yes.

"Q Do you know whether all the statements contained in it are true?

"A I believe they are.

"Do you also recall, Mr. Levy swearing under oath to responses and objections of plaintiffs in Morris Levy to defendant Apple Records, Inc. first set of interrogatories in which in response to interrogatory 37, which asked you to subscribe in full the agreement, you say in part and let me let you look at it with me so I don't misstate it.

"That in or about October 1974, Lennon individually and on behalf of Apple agreed with Levy on behalf of Big Seven that the October 1973 settlement would be modified to provide that Lennon would record approxi-

mately 15 rock and roll songs including several songs previously recorded under the production of one, Phil Spector, which would be sold as a record and tape under the title 'Roots' hereinafter referred to collectively as the album, by Big Seven or its assignee on a worldwide basis through mail orders and retail fulfillment centers by means of television purchase merchandising."

Do you remember saying that?

A Yes, sir.

Q Sir, do you also remember signing under oath on August 7, 1975 a notice of a motion in the State Court -- I'm sorry, it is an affidavit. That was in the State Court. In which you say, paragraph 4:

"In or about October, 1974, defendant John Lennon, individually and on behalf of Apple Records, Inc., Apple, entered into an agreement with plaintiffs whereby Lennon agreed he would record approximately 15 rock and roll songs for plaintiffs which songs would be sold as a record and tape under the title 'Roots', the album by plaintiff Big Seven or its assignee on a worldwide basis by mail order retail fulfillment centers by means of television merchandising."

Do you recall that, sir?

A Yes, sir.

Q Do you remember sending a letter to Mr. Dolgenos on January 9, 1975 in which you said in part:

"In accordance with the agreement reached during those negotiations, John Lennon has recorded 16 sides which I will market throughout the world by use of television merchandising".

Do you recall writing that letter?

A Yes. Can I say something about that?

Q Sure.

A We did agree, Big Seven and myself in a sense that we had to get EMI's permission.

THE COURT: Is there anything else?

MR. PRETTYMAN: I think I do have a few more, your Honor.

THE COURT: Okay.

Q As part of your deal with Mr. Lennon, were any financial arrangements of any kind made in regard to EMI?

A No, we never got to that stage.

Q You never got to that stage.

I think you testified that Adam VIII itself does notsell outside the United States, is that correct?

A That is correct.

Q But Adam VIII does license companies outside the United States to sell its packages?

A That is correct.

Q Is it not true that only Big Seven licenses outside the United States?

A The packages?

Q Of the two companies only Big Seven licenses outside the United STates?

A Big Seven is only in the copyright business.

Q I'm sorry I asked that question in that form. I misread your deposition testimony. Big Seven, I take it, does not license at all, correct, outside the United States, I mean?

A In packages, no, sir.

Q Big Seven of course assigned all of its rights to Adam VIII?

A I believe so.

Q How were you then claiming to have the albums sold abroad? Was Adam VIII going in turn to assign or license its rights to other companies?

A We never got to it.

Q It doesn't do it itself, does it?

A No.

Q So it would have to nse its rights to other companies?

A Yes.

Q Was that explained to Mr. Seider and Mr. Lennon that Adam VIII, that Big Seven's licensee or assignee was in turn going to have to license other companies?

A I don't think on October 8th we even discussed how it would be assigned. We just discussed that Adam VIII would do the selling in the United States for Big Seven. I don't think we got to that part of it.

Q Has Adam VIII paid any money to Big Seven under the assignment?

A I don't believe so, I don't know.

Q You said that the assignment was not mentioned during the October 8th meeting. Was Mr. Lennon or Mr. Seider informed of that assignment after it was made?

A That assignment, I believe, is dated December 11 or 12, wasn't it?

Q Were they informed of that?

A I don't think so, no.

Q Were they sent a copy of it?

A No, I don't believe so.

Q Mr. Levy, at the October 8th meeting when you concluded this deal who was it contemplated would actually begin the TV mail campaign? Who would make the decision that "All right, we are going to put it out?"

Was that you? "At a particular time we will begin. Maybe we will begin in November, December, January."

But you got to begin some time and somebody has to make the decision?

A I don't think that was discussed, that some particular person would make a decision.

Q On this point let's get away from what was agreed to. What was in your mind? Did you assume you had the power to begin this campaign when you wanted to?

A I assumed I had the power to begin the campaign

when everything was done, and that meant that John was happy with the commercial, with the picture and everything else.

Q Who would decide when it would end? You said the period was not specifically agreed to. So somebody has to make the decision, "All right, it is all over."

Now, did you have to get his permission to do that?

A No, we did not discuss it, but we talked about CPOs. I think that would make the decision for all of us. Once it was not profitable it would end.

Q Somebody has to decide it is not profitable?

A That is done right where we advertise each day. The mail is counted against the stations, and that would be going on and off continuously.

Q You are not telling me the advertising department made the decision when that would stop?

A No.

Q Isn't it true that you would make the decision as to when to stop the campaign?

A No, not completely. It would boil down to the CPO, if we had a station and it is costing out and making money, it would stay on that station. If that station goes into the negative side, somebody don't come in and say,

"Shall we cut this station?" I hope they will cut that station as soon as it is on the negative side.

THE COURT: Cost per order?

THE WITNESS: Yes.

Q You didn't feel that you had to go to Mr. Leonnon and get his permission to stop the campaign?

A We didn't discuss it; it never came up.

Q What was your understanding?

A I didn't even think about stopping the campaign. It would stop. It never came up, Mr. Prettyman.

Q Is it fair to say that you at least affirmatively did not believe that you would have to go to Mr. Lennon in order to stop any TV mail campaign that you once got going?

Can you answer that?

A I think it would be fair to say if I was losing money on the CPOs I would stop it immediately or people working for me would.

THE COURT: Let us suppose that you were just putting out a mail order sales.

THE WITNESS: Yes?

THE COURT: And that you didn't get any permission or agreement that you could market it through retail stores, let us assume that. Now, that would mean that at the conclusion of your mail order campaign somebody

might want to market it through retail stores?

THE WITNESS: That is right.

THE COURT: Was there any thought given to who would do that? Would it be Capitol taking your album or Capitol doing a new album?

How would that be done?

THE WITNESS: At different points I had different thoughts. October 8 would be one way; in February another. If what we were doing on October 8th till January 30th was all right, I would try to talk them into letting me do the retail. It depended. If after February which what happened, the sequence of events that happened, it would be their decision to take it back if I stopped the mail order, I wouldn't have any more rights to it.

THE COURT: Quite frankly, Mr. Levy, I am puzzled by the idea of a contract that simply dealt with the mail order rights and left the retail side of it hanging. I just want to tell you that. That came as a realization to me last night, that that is what we have, and I don't quite understand it.

THE WITNESS: It is happening right now between me and Capitol in a sense. I have a package out and it is not spelled out, and I don't know if it is spelled out

that way in the contract, of some 20-odd songs from the Capitol catalog exclusively for mail order, and I am running it right now, it is on the air, we are advertising it right now. It goes without saying that Capitol is not going to put this same mail order package out in retail stores while I am running that on television. It just would not be done.

THE COURT: Let us suppose after your mail order thing has run its course, is the record dead or is Capitol going to market it? Have they got the right to market it through retail channels?

THE WITNESS: Any way they want. I did a package about three years ago for RCA, Arthur Fiedler and the Boston Pops, and it was put out for $8.98. RCA created this package for me, and RCA has 110 albums in their current catalog of Arthur Fiedler, and this was Arthur Fiedler in the '40s, and as a result they were selling their catalog albums all over the United States, besides being paid a royalty by me.

RCA sales ran high if I ran an Arthur Fiedler commercial in Des Moines, Iowa or in Kansas City, the local areas thefe would start to sell Fiedler albums, and they have 110 LPs in the catalog.

THE COURT: The old records?

THE WITNESS: Yes, in depth, and I got figures. I could use that sometimes as an example to maybe try and talk another record company to give me an important artist.

THE COURT: I know it is dangerous to get into these other instances. I don't want to start debating it with you or anything. But I don't understand how that would apply here. I mean, how would it apply here? Would Lennon or Capitol or any of these parties be interested in having you promoting the old original albums?

THE WITNESS: We are doing it right now with Capitol. We are doing albums of Jackie Gleason, those orchestrations in the '50s.

THE COURT: Original Capitol Records?

THE WITNESS: Yes, I am marking them mail order on an exclusive basis. I am testing them right now.

Q In this regard who owns the master tape of the Roots album?

A EMI owns the master tape.

Q Of the Roots album?

A I have never questioned that.

Q I refer you to page 458 of your deposition, sir:

"Q Mr. Levy, whom do you believe owns the master tape of the Roots album?

"A Believe? That is conjecture. It does not mean anything.

"Q Do you have a belief?

"A Right now I am thoroughly confused who is what. 'Who is on first?'

"Q You are saying you don't really know who owns i?

"A Not specifically at this point.

"Q Is the matrix of that album and master of that album the same thing?

"A No, the matrix would be made from the master tape. It is the next step.

"Q The matrix would be the lacquered master?

"A Yes, I think we went through that, too.

"Q Do you have an opinion as to who owns the matrix of the Roots album?

"A Well, it is made from the master recording. Whoever owns the master recording would own the matrix made from the master recording.

"Q And you have no opinion on that subject?

"A No."

What is your present opinion as to who owns the master?

A EMI.

Q Would you name me quickly, Mr. Levy, the cost would go into the CPO? Let me name some off and you just tell me quickly whether they would be included in your CPO.

A Yes, sir?

Q Advertising?

A Yes.

Q Manufacturing?

A No.

Q Jacket?

A Nothing but advertising. If I may save you some time, nothing but advertising is CPO.

Q The advertising is the CPO?

A That is correct, sir.

Q When you talk about costing out, what is the cost that you could afford on this album and still make it go, this $4.98 album?

A Make a go of it?

THE COURT: What do you mean "make a go?" Make a profit or break even or what?

Q Mr. Levy, as I understand it, you constantly watch your cost on a test market to make sure that you can make money on the album?

A Not only test market, every day it is running.

Q What I am saying is on this particular $4.98 album what are the total costs that you feel you could afford and still keep it profitably on the market?

A Over $2, well, over $2 and still keept it on the market hoping for the cost to drop. The cost don't stay the same each week, Mr. Prettyman.

THE COURT: Are you talking just about advertising?

THE WITNESS: CPO, yes. It can go that high and there is still profitability in it and hoping that the costs will drop as you advertise more and more.

THE COURT: In other words, the maximum CPO that you could have and still make a profit would be $2?

THE WITNESS: Maybe a little more: it can even go above $2. Let us take the costs and go backward. It could go over $2.

THE COURT: What would it be?

THE WITNESS: Let us take it backwards. Let us use round numbers.

Pressing would be 40 cents; jacket, 10 cents, is 50 cents; let us say 60 cents for the mail order, that is $1.10 --

THE COURT: 40 cents for pressing and --

THE WITNESS: 10 cents for the jacket.

THE COURT: The mail order costs?

THE WITNESS: 60 cents; A.F.M., 6 cents; 20 cents for the copyright -- that is a round number -- 60 cents for Lennon -- how much is that?

MR. PRETTYMAN: I have no further questions.

THE COURT: Wait a minute. We got to add this columr up.

MR. PRETTYMAN: I am sorry.

THE WITNESS: We can go as high as $3 on advertising, hoping it will come down. You can have an $8 per order cost at first, but it has to be watched, because the first eight people just don't send in orders, but as you get into it you see it drop.

THE COURT: I get a figure her of $1.96, if that is correct.

So you are interested in a kind of average?

THE WITNESS: It comes down to. But then there is a point when it comes down to where you peak and then it starts to go up, and you have to be very careful.

THE COURT: Mr. Grumbach, do you have anything?

MR. GRUMBACH: Yes.

THE COURT: We will take a short recess.

(Short recess.)

CROSS EXAMINATION

BY MR. GRUMBACH:

Q Mr. Levy, you testifeied in response to Mr. Prettyman's questions that Adam VIII did the foreign licensing?

A No, I don't believe so.

Q Who was going to do the foreign licensing of this album?

A I don't think I really cleared that up in my mind. It probably would have to be Big Seven when it got down to making the contracts.

Q Didn't you just say to Mr. Prettyman that Big Seven was just a --

THE COURT: I am not sure what foreign licensing we are talking about.

MR. GRUMBACH: Of the Roots album.

THE COURT: He does not claim he had foreign rights. You tell me, because I did not understand Mr. Grumbach's question.

MR. SCHURTMAN: I am sorry. What are we talking about?

THE COURT: Mr. Grumbach asked who would do the licensing foreign or whatever it was?

MR. GRUMBACH: For the worldwide sales, outside

the United States.

THE COURT: I said I didn't understand that question, because I did not understand you now to contend that Mr. Levy had rights to market outside the United States.

MR. SCHURTMAN: We contend, your Honor, that it is still not clear at this point. As soon as I get a chance and read the record I will clarify it. That is my point. I will be glad to explain it.

THE COURT: Mr. Levy, when you came out with this album in February, did you believe that you had the right to market it outside, let's say, North America or outside the United States?

THE WITNESS: No, based on what Allen Klein told me and other things, no.

THE COURT: Doesn't that run this academic, Mr. Grumbach?

MR. GRUMBACH: It depends on what Mr. Schurman says.

THE COURT: We have the plaintiffs' representative here on the stand. I can't see asking him about a thing that he said he did not intend to do.

MR. PRETTYMAN: Your Honor, may I state an objection, sir?

THE COURT: To what?

MR. PRETTYMAN: You were asking him as of February what his view was, and I think it should refer to October.

MR. SCHURTMAN: If we are going to argue the point, I would like to argue it, too.

THE COURT: The only thing I am interested in, I don't want to have a question built upon some unrealistic assumption. You can try to rephrase your question so that it means something.

Q Mr. Levy, didn't you also contemplate, according to your understanding, that you would have worldwide rights and that, in fact, it would be Big Seven that would license outside the United States and I refer you to page 161 of your deposition.

A Yes?

Q Now, Plaintiffs' Exhibit 28, which is the assignment to Adam VIII assigns all rights of Big Seven to Adam VIII. How is Big Seven going to do the licensing outside the United States?

A It would do it.

Q Despite Exhibit 28? Is that your testimony?

A Or Adam VIII would do it, whichever is necessary, I said, would do it.

Q Is it your testimony that when you acted in this transaction you did so solely as an officer of Big Seven and Adam VIII and not in an individual capacity?

A Which transaction is that?

Q The alleged deal that was reached on October 8th?

A I did that for Big Seven and for Adam VIII.

Q Not for yourself on a personal basis?

A No.

Q Now, isn't it important when a person makes a contract with a company to make sure which company he is making the contract with, because if the company isn't financially solvent you put out the album, the company may go into bankruptcy, and then you are a general creditor and you may get only 20 cents on the dollar?

A I don't follow what you mean by that.

THE COURT: That is the answer, he doesn't follow what you mean.

Q Isn't it a fact that Adam VIII lost a lot of money?

A That year, yes.

Q Isn't it a fact that Big Seven also lost a lot of money?

MR. SCHURTMAN: Your Honor, is that relevant?

MR. GRUMBACH: It is relevant because one of the

essential terms in the contract that was never discussed at this meeting was who is going to be responsible to Mr. Lennon.

Q Isn't it true that one of your other wholly-owned companies went into bankruptcy and paid its creditors 20 cents on the dollar?

A No, sir.

THE COURT: I suppose there are a lot of possibilities, but let us not just think up every wrinkle we can possibly think up, because we will be here for a long, long time.

MR. GRUMBACH: I don't intend to be here very long, your Honor.

Q Mr. Levy, your counsel turned over to us a group of agreements that your companies entered into in connection with putting out the Billie Holiday package and the Arthur Fiedler package and the Soul Train super hits packages. I want to show you some of these contracts. The first one is a contract between Polydor and Roulette, dated June 1, 1973. Isn't it true that that agreement says:

"It shall be a prima facie breach of this agreement of licensee if Polydor discovers that any of the records originally sold by it to

licensee pursuant to the terms of this agreement are found to be in the normal channels of retail distribution or by other methods which are not mail order marketing methods"?

A That is a pure mail order package, as I have described before.

Q Is it also true, Mr. Levy, that that agreement provides that Polydor has the right to enter licensee's premises and those premises of its agents to insure compliance with the terms of this agreement?

A If it says so.

Q Is that a boilerplate provision?

A I would call that boilerplate.

Q Is it also true that thatagreement provides that you have to furnish Polydor free of charge as soon after release as possible with the appropriate sleeves, jackets or covers, and that Polydor has the right if in the opinion of Polydor they do not conform to Polydor's standards, to cease further distribution of the album?

A It says so, but we never did it.

Q Is that a boilerplate provision?

A Yes, in that type of mail order.

Q Isn't it true that this agreement provides that each recording, tape, master or matrix which may be supplied

by Polydor under this agreement, all mothers, stampers and other derivative parts supplied by Polydor, as well as album graphics, if supplied by Polydor, and all duplicates thereof belong to Polydor?

A That is true.

(Continued on next page.)

Q Is that a boilerplate provision?

A That's true.

Q I'm not asking you if it is true, I'm asking you if it is boilplate.

A Yes, I would say that is put into all --

Q Here is a clause that says "Licensees shall make no sales or other dispositions of Records by methods such as 'scrap', 'bulk' or "dumping" sales."

Is that boilerplate?

A That's in it.

Q Isn't Adam VIII in the business of dumping, was the question?

A Not in mail order product, not in pure mail order product because we manufactured the things that would make it confused.

Q Now, this provided that "Licensee shall furnish to Polydor within 45 days following the expiration of each calendar quarter year, a quarterly sales and royalties statement".

Is the quarter-year provision boilerplate?

A No. If you go to Capitol with an agreement on the same terms of mail order, we're paying the royalties as they press it and on the other half of that agreement it is included in the pressing fee because we are using

RCA to press the records. That's more boilerplate on a pure mail order package.

Q There's a provision that says, "If licensee shall sell or otherwise dispose of substantially all of its assets to a Third Party the Term of this agreement shall automatically terminate."

Is that boilerplate?

A That's boilerplate to almost every agreement there is.

Q Is it boilerplate on the termination of the agreement you are obligated to destroy your entire inventory of records?

A That's boilerplate in some agreements.

Q Is it boilerplate that this provision that says prior to the rlease of the records you have to obtain the prior written approval from Polydor of test pressings?

A No. That's not boilerplate. That was specifically put in there.

Q The agreement provides that, "Prior to the release of the Records, licensee shall submit two copies of such Records and copies of all art work to be used on the packaging of the Records and shall not release either the record or the art work to the public until the licensee has received Polydor's written approval for same".

Is that boilerplate?

A I would say so because I never got their approval. I sent it to them and it never came back and they said so that's part of --

Q Then the agreement provides for $15,000 advance. Is an advance boilerplate?

A That's negotiable.

Q When did you stop selling the Billie Holiday album?

A I don't know.

Q Is it possible that as late as October of this year you sold the Billie Holiday album?

A I don't know.

Q I show you an agreement dated April 9, 1973 between Roulette and Atlantic with respect to Billie Holiday and it says in paragraph 2, "Said recordings may be used on said albums only and shall be distributed by you in connection with one television promotion only".

Do you recall that agreement?

A Yes.

Q You don't remember when you stopped selling the Billie Holiday albums?

A What's that got to do with the agreement?

Q You had one television promotion but you might

still be selling them, is that right?

A I might have called Atlantic and extended it. Atlantic and I are very close. I got hundreds and hundreds--

Q I represent to you, Mr. Levy, your counsel did not still turn over --

A I could do it with Atlantic on the phone. I've got many agreements with Atlantic which are strictly phone jobs that were never put on a contract.

THE COURT: You see, you ask a question and you get the answer.

MR. GRUMBACH: I'm happy with the answers, your Honor.

THE COURT: I don't make light in any way of what you are trying to bring out. I think that it is conceivable that the Court should know something about the kinds of provisions that have to get negotiated to make what you consider a complete agreement. But you see as so often happens, it isn't a very good way to bring it out through your opponent. Mr. Levy is suing you or your client. Now, it is possible that maybe -- I wouldn't object to having some expert come in who is thoroughly familiar with contracts in this field and who could testify as to the kinds of provisions which are normally so-called boilerplate that you don't talk about them much and the kinds of things that

have to be negotiated. I don't know. But I must tell you I'm not getting -- certainly I have respect for the point you are trying to bring out. I'm not getting much out of your questioning and Mr. Levy's answers because --

MR. GRUMBACH: Your Honor, I intend to split the agreements and I think if you simply look at --

THE COURT: I'm not going to get a lot out of the agreements. I tell you that right now. You can forget that. If you want to have some person who you can prepare, fine. This is the kind of testimony you prepare. Mr. Levy you can't prepare him on this and he's your opponent. Get somebody and prepare him in his answers. If you want to do it along those lines, fine.

Otherwise, I'm not going to receive those contracts. I wouldn't know what to make out of them if I read them. Is there any other point you want to cover in your cross examination of Mr. Levy?

MR. GRUMBACH: Yes, your Honor.

THE COURT: Okay.

Q Mr. Levy, I suggest to you that every album that Adam VIII has ever made, from 8001 in the catalog up to Roots was still for sale in October or September of 1975. Do you disagree with that?

A In the Adam VIII catalog?

Q Yes.

A Well, there may be some in the bounce backs, in the bounce back as somebody writes in we'll fill an order. But we're not advertising on television.

Q I didn't ask you whether you are advertising on television.

THE COURT: When does this period start?

Q When did Adam VIII put out its first album?

A I guess around the end of '72, I don't know.

Q That was "40 Original Country Goldies"?

A Yes. We have renewed the contract on that, two months ago. We renewed the contracts on that and we had to change ten songs because Columbia wouldn't let us -- it just triggers me, your Honor. We just renegotiated the contracts on that particular album.

THE COURT: All he wants to know is this, you started putting out the Adam VIII albums in the end of 1972?

THE WITNESS: That is correct.

THE COURT: Were most of them -- what's the date, the termination date you were given, October '75?

MR. GRUMBACH: I said September or October of 1975 which is the last information we got from the plaintiffs.

THE COURT: Were all or most of those albums still on the market as of October '75?

A In regular TV, no, sir.

MR. GRUMBACH: Your Honor, it is important to distinguish. I'm not talking about whether they were promoted on TV. I'm asking whether his company offered them for sale if somebody wrote in?

A If somebody wrote in, sent a check?

Q Yes.

A We'd have to sell it to them by law.

Q Isn't it a fact that RCA which is your fulfillment center keeps stocks of those records for just that purpose?

A I don't know if RCA keeps stock on numbers like that there because they don't like to keep stock unless it is moving big. They may have some of them there.

Q Page 105 of this trial transcript:

"THE COURT: So they have a stock of records?

"THE WITNESS: Of all our various products and they will fill the orders for us.

"Q So this is in essence a mail order fulfillment center?

"A That is correct."

THE COURT: Now, anything else?

Q Mr. Levy, do you contend that Harold Seider in any way represented Apple Records, Inc. in dealings with you?

A I guess I contend that because he represented John Lennon and John Lennon was the president and they were together when they made the deal. I don't know the legal ramifications, but I guess, yes.

Q I show you Defendants' Exhibit AS in evidence and a set of answers to interrogatories sworn to by you on September 11, 1975. Question No. 22:

"Identify any persons whom you contend acted or communicated on behalf of, purported to bind or otherwise represented Apple in any dealings with you that you contend Apple had with Big Seven or Adam VIII or Morris Levy between September 1, 1973 and February 1975."

We had broken it into categories.

Response "John Lennon."

Was that your sworn statement?

A And his lawyer.

Q And did you put in "and his lawyer"?

A No.

Q Was this response to interrogatories prepared

with the assistance of your lawyer?

A Yes.

Q Now, you testified, Mr. Levy, just a little earlier, you now think you got the tapes in December, rather than in the middle of November, is that right?

A I believe so.

Q Your examination before trial, Mr. Levy, at page 382 -- beginning at 381:

"Q In any event I want the details of how you received these two master tapes.

"A I think one was delivered to the club. I was having dinner with John and May Pang and they called the studio and had it delivered to the club. One set of tapes.

"Q What meeting was that?

"A I don't know. November. I can't say.

"Q Early November, mid November?

"A No. It would be mid or the third week or late November."

Then at this trial --

THE COURT: You don't have to read trial testimony.

MR. GRUMBACH: Page 242, your Honor.

Q Mr. Levy, you testified during this trial that

you sometimes made in your practice oral agreements. Was it also on occasion your practice to begin to do things that you had no agreement for and in effect jumped the gun?

A I don't believe so as a rule, I certainly don't think so.

Q Let me see if I can refresh your recollection. I refer to the case of Craig Illleneuve v. Roulette Records, 68 Civ. 2128 in this court before Judge Motley, decision rendered July 31, 1975. Page 20.

"Defendant's May 10, 1966 contract with Mc Connell was hastily prepared because defendant's president Levy had already made commitments to sell 'Hanky Panky' records before he had legally acquired rights in the song." (Tr. 299-300).

A Mr. Grumbach, in that particular thing we signed the contract and paid out hundreds of thousands of dollars of Roulette's on that signed agreement and Tommie James and Shondells stayed as an artist under my direction right up to about three years ago.

THE COURT: I just can't get into that case.

Q Now, Mr. Levy, you testified that there was really no discussion at the October 8th meeting as to the intended duration of this agreement, is that your testimony?

A Yes.

Q Let me read you page 129 of your transcript here.

THE COURT: Please do not read the transcript here. Having it once is enough.

Q Mr. Levy, did you not tell Mr. Lennon at the October 8th meeting that you had a club by Checker album that had been selling for over a year and a half and isn't it true that your testimony is that that idea sparked him?

THE COURT: Is this something he testified to earlier?

MR. GRUMBACH: Yes.

THE COURT: Why ask him about it?

Q Mr. Levy, was it your understanding that record club is different from direct mail to consumers?

A Yes. In the sense, if you are talking about mail order rights and record club, record club I think I testified is a small part of mail order rights.

Q Reading page 739 of your transcript of your deposition:

"Q Is a record club the same as direct mail to consumers?

"A I would put it in the same category."

MR. SCHURTMAN: How is that inconsistent?

THE COURT: Please, that's not.

Q Would you agree or disagree with the statement

that that says, "Through direct mail and/or mail order in accordance with merchandising methods known and understood in the mail order being 'business subscriptions' or club plan methods?"

A If you want me to explain it.

THE COURT: Don't explain it. I don't comprehend the question. What are you reading from?

MR. GRUMBACH: I'm reading from a standard form that I believedto be used by Mr. Levy's companies for their contracts in which they, as far as I can tell, equate direct mail with club plan.

THE COURT: So, did he negotiate the contract between Apple and Capitol or EMI and Apple in 1969. Please, I don't think we are getting anywhere. Have you got anything else?

MR. GRUMBACH: I don't think I do. Can I look for a minute?

THE COURT: Where do we stand? Do you have any redirect?

MR. SCHURTMAN: I have some redirect.

THE COURT: Okay.

MR. SCHURTMAN: May I proceed?

THE COURT: Certainly.

REDIRECT EXAMINATION

BY MR. SCHURTMAN:

Q Let us go very quickly into the question of biolerplate. I show you Plaintiffs' Exhibit 12 which is the 1973 settlement agreement that was approved by Judge Griesa. Now, I ask you, does that agreement name all three compositions that were to be transferred?

A No.

Q Does this agreement relate to the licensing of songs on the one hand and the leasing of masters on the other hand?

A I don't understand you, Mr. Schurtman.

Q I'm trying to go too fast.

A I was trying to read it while you were talking.

Q This was the Come Together settlement agreement?

A Right, sir.

Q That requires Big Seven to license three songs to Mr. Lennon.

MR. PRETTYMAN: I object to leading. The first question was leading and I didn't object but he's continuing to lead now.

THE COURT: It is in evidence Mr. Schurtman. If you want to argue that --

MR. SCHURTMAN: It is a point I can make on argument. But it is an agreement that didn't contain the boilerplate that Mr. Grumbach thinks is so important. It was an agreement that was drafted by Marshall, Bratter.

MR. BERGEN: I object to that.

THE COURT: All right. You'll go through that on argument.

Q Now, prior to the October 8th, 1974 meeting, Mr. Levy, I believe you testified several times that you had read the Playboy magazine interview with Alan Klein and you had spoken to Alan Klein in 1973.

A That is correct.

Q Now, the Playboy magazine article contained the following statement:

"We got the boy's increased royalties but more important than that we got them total control and ownership of their product in America."

Now, when you walked into that October 8th meeting, based on your reading of the Playboy article and based on your 1973 conversations with Mr. Klein, what was your understanding of Apple's position in this situation?

MR. PRETTYMAN: Objection.

MR. BERGEN: Objection, your Honor.

THE COURT: Well, no. If he had an understanding based on those things, he can answer it.

A Apple had control of all the products of the Beatles in the United States.

Q Was it your understanding that Apple would not give a record to Capitol, that Capitol could not distribute it?

A I knew that from even another situation.

Q First of all, did you know that?

A Yes.

MR. PRETTYMAN: May I have the question read, please.

(Question read.)

MR. SCHURTMAN: Let me clarify the question.

Q Mr. Levy, on October 8th, 1974, was it your understanding that Apple had control over when and how Apple masters would be released?

A Yes.

Q In the United States?

A Yes.

Q Was it your understanding that if Apple had a master and decided to sell it through mail order in the United States, that there was nothing Capitol could do about that?

MR. GRUMBACH: Your Honor, he continues to lead the witness. May I have a standing objection?

MR. BERGEN: I object, too, your Honor. I think he is impeaching his own witness.

THE COURT: No, I wouldn't venture on that. I will let it stand. I don't know any other way to phrase it.

Q Was it your understanding that if your company had --

THE COURT: If you are going to go on in this vein, I think it is not very persuasive if it is your words. I know you're trying to sav time but I think you better try to bring out through his understanding and his words and not yours, Mr. Schurtman.

MR. SCHURTMAN: Fine, your Honor.

Q Would you clarify -- strike that. Would you state what your understanding was on October 8th as to what would happen after the mail order package had been completed?

A The sales, you mean the sales of the mail order package?

Q Well, did you have any understanding as to whether there could be subsequent regular retail sales?

A You mean normal retail sales? We didn't discuss normal retail sales at all.

Q Now, on this question of worldwide rights, Mr. Levy, let me take you to the meeting with Mr. Seider on January 30th where Mr. Seider told you whatever you have testified he told you. Did you call me at that time and ask me to come to that meeting?

A Yes, sir.

Q Did I come to the meeting in response to your call?

A Within 20 minutes, Mr. Schurtman.

Q Was Mr. Krasilovsky there?

A He already arrived. I called him at the same time I called you and he's closer and I think he got there five or ten minutes before you. I'm not sure which one arrived first.

Q Did you relate the facts of the situation to me?

A Yes.

Q Did you tell me your recollection of what had happened on October 8th?

A Yes.

Q Did you show me the letter that you had sent to Mr. Dolgenos on January 9th, Plaintiffs' Exhibit 31 in which you said, "In accordance with the agreement reached during those negotiations John Lennon has recorded 16 sides

which I will market throughout the world by use of television merchandising"?

A Yes, I showed you that letter.

Q Did I ask you whether you had worldwide rights?

A Yes.

Q Now, [illegible] you released the record, were you preparing to fight off an injunction at that point?

A Yes.

Q What did you do in connection with that?

A We started gathering all the information we could, putting down dates, trying to resolve dates that this happened and preparing to show how the sequence of events led up to me getting the tape and so if we were hit with injunctive papers we could go into the courtroom within a short time to stop the injunction.

Q Were any injunction proceedings brought against you at that time?

A No, sir.

Q What happened instead?

A Instead as we started the market, to put in very short terms --

THE COURT: Didn't we have that?

MR. SCHURTMAN: I'm just laying a foundation for the next question.

THE COURT: Go right to that.

Q If I may lead slightly in that. Were telegrams sent by our suppliers telling you they would not do business with you?

A That is correct.

MR. GRUMBACH: Your Honor, the telegram said no such thing.

Q Telling you they would not handle the Adam VIII's album?

A Yes.

THE COURT: All right. The telegrams were sent. What's the point?

Q Now, after that, did you decide to start this action against the defendants in the State Court?

A When they didn't try for an injunction and we were dead, we couldn't sell a record or fulfil --

THE COURT: You started an action in the State Court?

THE WITNESS: We started an action in the State Court, that is correct.

Q Now, there was considerable confusion on your testimony on cross examination, even when the Judge questioned you and that's the point I'd like you to clarify. You said that at the time you wrote the letter

you thought you had worldwide rights, but then by the time you started putting out your album, you felt that you couldn't rely on any representations that had been made and you did not intend to sell the album worldwide. Can you explain what happened in between?

THE COURT: I didn't recall him saying that.

MR. BERGEN: Neither did I, your Honor.

THE COURT: The record will stand for what it stands for. But don't lead him. You can't lead him this way.

MR. SCHURTMAN: I don't have his exact testimony, I'm relying on my notes.

THE COURT: You have got nine volumes of a record and you should have it if you want to use it. I can't permit that question because I don't recall the testimony in that way.

Q When you sent the January 9th letter, you said you would market it throughout the world by use of television merchandising. What did you mean when you took the position you had worldwide rights?

A When Seider spoke to me, I wanted EMI to do it and I believed I had worldwide rights.

Q Did you know if Seider had spoken to EMI at that point?

A January 9th?

Q Yes.

A The last time I seen Seider was the end of December, I didn't believe he had spoken to them yet but he said he was going to take care of that.

Q Did Seider ever tell you at one point that it would not be necessary to go to England?

A Yes. He told me it was not necessary to go to England.

THE COURT: I can't permit leading in this way. Again, particularly, I must tell you, Mr. Schurtman, this is so contrary to my memory of the record. My memory of the record is I never understood Mr. Levy to say that by January 9th or any other date he thought he had worldwide rights.

No, I don't --

MR. SCHURTMAN: He said so in the letter.

THE COURT: That's the whole point. Did he write the letter contrary to what he understood and you can't assume something -- look, please. The letter is the letter. His testimony is his testimony.

MR. SCHURTMAN: I'm asking him why he wrote the letter the way he wrote it.

THE COURT: That's another question.

MR.SCHURTMAN: That was basically my question.

THE COURT: Why did you write the letter the way you wrote it with respect to worldwide rights?

THE WITNESS: Because I believe the deal we made I was getting worldwide rights when it was finally put down in writing. I would be getting worldwide rights. The only think that stopped --

THE COURT: Did you believe that you had worldwide rights?

THE WITNESS: That I had them already so I could go and market another country?

THE COURT: Yes, I mean that.

THE WITNESS: No.

THE COURT: Okay. Then that's the end of that.

Q In your pretrail depositions, did you testify as to what had been said on October 8th with respect to foreign rights?

MR. GRUMBACH: Is he suggesting that the witness remembers his entire 700 odd page deposition?

MR. SCHURTMAN: I'd be glad to read it to him.

MR. BERGEN: May we know it?

MR. PRETTYMAN: What is the purpose? I object unless there is some --

THE COURT: Objection is sustained.

MR. SCHURTMAN: May I explain the purpose?

THE COURT:Yes. You can't just read your client's deposition.

MR. SCHURTMAN: I can read it for only one purpose. Your Honor made the point that counse made the point that the complaint alleged worldwide rights which it obviously did because it says so. The question was raised why did it allege worldwide rights when in fact the witness has testified at the trial that at the meeting on October 8th the worldwide rights question was subject to the consent of EMI. That was the question that your Honor raised. I am prepared to show that in the pretrial testimony which was taken seven months before this trial the witness carefully explained to counsel the distinction. He testified and that's -- it has to do with the claim of recent fabrications. That's all.

In other words, counsel had suggested to you the complaint said worldwide rights and now at the trial they are suddenly met with completely different testimony. That simply isn't so.

THE COURT: I think at the trial Mr. Levy has taken the position throughout and has testified that -- he has testified about a number of conversations about

worldwide rights. He has consistently, to my knowledge, testified that he was seeking worldwide rights, he was asking Seider to call Len Wood and so forth but he never got worldwide rights.

I don't think anybody is saying that is a recent fabrication. I don't understand that to be claimed by the defense or you or anybody else. Now, the defendants have pointed out that this position and testimony at the trial is in contradiction to statements in the pleadings and the discovery which were made or approved by Mr. Levy when he alleged that the contract was for worldwide rights. Now, if you want to show me some other statement in discovery which is consistent with his trial testimony, that might be relevant.

MR. SCHURTMAN: That's what I do want to show you.

THE COURT: What is that statement.

MR. SCHURTMAN: Pages -- there are several pages. Let me get the best one for you. Page 109.

"Q Did Mr. Seider indicate in any way that EMI permission was obtained before any Lennon album could be sold and distributed?

"A In the states?

"Q Anywhere?

"A In the states they were very clear that the rights rested with Apple. Foreignwise there was some discussion, but in the states they were clear that no permission was needed for EMI.

"Q Will you tell us about that discussion and --

"A That is basically it.

"Q Why?

"A That in the states it was made very clear to me that Apple had all the rights and the rights were not given to CApitol. There may have been some problem on the foreign point which he would discuss with Len Wood."

Now, there are other passages in the deposition which are consistent with that.

THE COURT: I get your point.

Thank you.

MR. BERGEN: I would like to remind the Court that there was an affidavit --

THE COURT: Now, wait a minute. I have got all that. You don't have to argue that now, please.

MR. SCHURTMAN: Then, your Honor, at page 106 the witness said:

"At one point Harold said that he was going to England and talk to Wood about EMI, and then he changed his mind about going to England and said that it was not necessary."

That is the background.

THE COURT: All right.

BY MR. SCHURTMAN:

Q Mr. Levy, there was considerable testimony this morning about mail order costs, retail fulfillment costs, high costs, low costs --

MR. SCHURTMAN: Your Honor, I can do it one of two ways. We have tried to reconstruct two columns. One says U. S. mail order, one says U. S. fulfillment. There is a column saying high, there is a column saying low. What I would like to do is ask the witness of his own memory to reconstruct it, or we can save time and have

him verify the figures on the sheet. They are consistent with the figures he gave you this morning. But in a single form it might make it easier for the Court to follow.

THE COURT: Why don't you get him to identify that sheet and say who prepared it and so forth. Have it marked for identification.

MR. PRETTYMAN: May I ask what the purpose of this is?

THE COURT: Maybe it is a summary of his testimony this morning.

MR. PRETTYMAN: How are we going to voir dire him. I don't have the transcript from this morning.

MR. SCHURTMAN: I am sorry, but I am conducting the redirect now.

THE COURT: Let us take it one step at a time.

What is the number?

BY MR. SCHURTMAN:

Q I show you Plaintiffs' Exhibit 89 for identification.

Can you identify this sheet?

A Yes.

Q When was it prepared?

MR. BERGEN: Can we have the witness speak up a

little bit so we can hear him.

Q When was it prepared?

A At lunch today.

Q Who worked on it?

A Myself and you.

Q Did anyone else work on it?

A I think Alan Kanzer was there too.

Q Did you give us the figures to put on the sheet?

A Yes.

MR. SCHURTMAN: It is simply a summary.

THE COURT: Why don't you offer it and the lawyers can have it overnight and check it against the transcript and see if it is of any use. It is just marked for identification.

MR. SCHURTMAN: I offer Plaintiffs' Exhibit 89 for identification.

THE COURT: I will reserve and the lawyers can look at it overnight.

Have you got anything else? How much more redirect do you think you have?

MR. SCHURTMAN: I would say about half an hour, Judge.

THE COURT: We have not moved along as fast as

I thought. It is nobody's fault.

On the proposal about a motion at the conclusion of Mr. Levy's testimony I want to say this, that I will find it hard, I believe, to make a ruling on the question of the existence of the contract without taking into account all the testimony on that subject. I find I have difficulty to simply isolate the testimony of Mr. Levy and say I will only regard the testimony of Mr. Kahl, that I will exclude from my mind the other testimony and rule On that basis. I don't think that is realistic.

MR. PRETTYMAN: I think I can save you time there, because we are perfectly happy to make our motion at the conclusion of the cross-examination of Mr. Lennon and Mr. Seider, and then you will have all your participants.

THE COURT: Here is what I would suggest, Mr. Schurtman, as long as we have gone this long, I think there is a certain amount of work we have to do to get the contract issue completed, but I think we can still maybe pare it down to some extent. This is my suggestion:

I would suggest completing the examination of Mr. Levy with what redirect you have, then complete or allow you to cross-examine Mr. Lennon and Mr. Seider.

I understand from the defendants -- I am assuming -- and correct me if I am wrong -- that you are willing at that point to rest on the subject of the question of the existence of the contract? Is that right?

MR. SCHURTMAN: Are you addressing that to the defendants?

THE COURT: To Mr. Prettyman.

MR. PRETTYMAN: I have not thought of it in exactly those terms, but I think the answer is yes, we will be prepared to make a motion on the existence of the contract at that time.

THE COURT: Which would mean you are willing to have it submitted?

MR. PRETTYMAN: At that time, yes, sir. I should have the others speak; I can't speak on behalf of other defense counsel.

THE COURT: Mr. Bergen?

MR. BERGEN: Yes.

THE COURT: Mr. Grumbach?

MR. GRUMBACH: I guess so. I am just concerned about your Honor's comment. Can I advise you tomorrow morning?

THE COURT: Yes.

Now, turning to the plaintiffs, I would hope

that they could have a format so that you will be willing to have the issue submitted at that time. What I have in mind, you mentioned yesterday your plan to have other witnesses come in as to what took place at the farm and to corroborate the testimony of Mr. Levy and Mr. Masucci.

You mentioned your plan to have witnesses come in on the practice of the industry in the making of oral agreements.

MR. SCHURTMAN: We have more than that, your Honor.

THE COURT: I think I basically indicated this yesterday, that I would assume that you could have other witnesses to come in to corroborate what Mr. Masucci said as to statements made at the farm. I think that would be cumulative. I would assume that you could have witnesses come in and testify that under various circumstances oral agreements are made and certain actions are taken upon these oral agreements and so forth. I will assume that you could produce such evidence. I think that neither of those points is worth a lot more trial time, because neither of those points, in my view, is critical to the questions as now framed about the existence of the contract. Indeed, I would assume you can have a dozen people come in and testify along the lines as Mr. Masucci did.

ms7 Levy - redirect

MR. SCHURTMAN: May I stop you on that point?

Mr. Masucci gave certain testimony. You heard it. He was cross-examined, and in a completely different field, and that may have some impact. What I would like to suggest, at the beginning of the trial before Judge MacMahon, the very first witness called was a banker from Florida named William Chapman, who was leaving on a trip that night. He was going to be away --

THE COURT: You can read h is testimony.

MR. SCHURTMAN: It is about five or six pages of testimony. I would like your Honor to see that testimony.

THE COURT: Well, that is simple enough.

MR. SCHURTMAN: We can read it in or I can hand it up to you.

As to the other witnesses who heard Mr. Lennon, who claim they heard Mr. Lennon admit he had a deal with Mr. Levy, we do have several people up at the farm, including a lawyer, including several other persons who were there. We also have an important witness, Mr. Garlick, whose name you have heard a number of times, who has given a deposition, and Mr. Garlick has given testimony that he knew that there was a deal between Mr. Lennon and Mr. Levy. Mr. Garlick was at the record plant on that birthday --

THE COURT: Let me ask you this:

You intend to call Mr. Garlick as a live witness? Is he here?

MR. SCHURTMAN: I believe he is back. He was away when we started the trial before Judge MacMahon. I would offer him on two points, your Honor, first, on Lennon's admissions that he had a contract, which admissions were made also in Florida; secondly, on the point that Mr. Garlick had the printing plant, Ivy Hill which stopped printing covers for the Roots album when they received a telegram from Capitol. I plan to use him as a joint witness on both issues.

Now, we have also in addition witnesses who will testify on custom and practice as to oral agreements, which I agree would be cumulative.

I planned to call another witness from RCA on the use of 7-1/2 IPS tapes commercially, to make commercial records. We had planned to call two expert witnesses, engineers, who would testify as to the differences between the 15 IPS and 7-1/2 IPS tapes.

And, finally, we would have Adam VIII's accountant, who would go into considerable detail onthe various damage figures and on the profits that would have been expected in this case.

ms9 Levy - redirect

THE COURT: What I want to do, and I think this is logical and accords with the Federal Rules, I believe it is perfectly proper, I would like to reach a point where I have the case submitted by all sides on the question of whether there was a contract. I would like to have you complete your proof on that. I would like to have oral argument on that. We have had some as we went along.

Today and yesterday I questioned you and Mr. Levy on the problem I seem to be having now on that. That is not a substitute for real oral argument. I would like to have you finish on that, not get into damages, and I would like then to hear different parties on their arguments, just as you would sum up to a jury, on the question of the existence of the contract. Then I would like to decide that issue.

As I said yesterday, if you win and there is a contract, that has certain legal implications and we go forward in a certain way. If you lose, that has certain legal implications and we go forward in a different way, obviously in a much more limited way, or maybe we don't go forward at all. But as far as the timing -- and I know that everybody has been doing the best they can, really -- but it is becoming increasingly hard for me. I had hoped

to have the case over before the end of this week -- not the case, but at least this issue. The absolute outside limit for me, I must say, is the end of the day Friday. I don't believe that is being too hard on you.

Now, if you can finish before that, that is all to the good. I got from the defense standpoint what they are contending, and I want to get it down from your standpoint.

You want to put on Mr. Garlick --

MR. SCHURTMAN: Chapman's testimony I can read in. That is simple. And Mr. Garlick.

I would have Mr. Sheresky testify briefly as to what he heard from Mr. Lennon on two occasions, once at the farm and again at Palm Beach, that there was a deal with Mr. Levy. There are other farm witnesses whom I want to call at this time.

THE COURT: So we have Chapman's previous testimony, Sheresky, Garlick.

MR. SCHURTMAN: Now, I could call Mr. Hoffman of RCA on the 7-1/2 IPS tapes. Again, that would be cumulative testimony, and he would simply say, yes, 7-1/2 IPS tapes are used on occasion to make commercial records.

THE COURT: That is in the record for what it is worth. That is up to you.

MR. SCHURTMAN: I can call him. That is in essence what he will say.

MR. PRETTYMAN: Your Honor, that would open a wholly new field. When we were submitting it on one issue, I thought we were submitting it on a particular point in time, and on that issue, and if we are going to open up the subject whether 7-1/2 IPS can be used, we are going to have a lot more testimony.

MR. BERGEN: We will put in some too, your Honor.

MR. SCHURTMAN: That is an issue that bears on the making of the contract.

MR. PRETTYMAN: May I make a suggestion to your Honor?

The reason I said a few minutes ago that I was prepared to submit on that issue, as I understand New York law, just in two sentences.

No. 1, we don't believe the parties subjectively thought they had a contract. Obviously, we don't think our people did. But even if they did, that is insufficient to create a binding and enforceable contract, if, in fact, the agreement does not contain the necessary terms sufficiently definite for the Court to determine there really was a binding contract there, and that is the issue

ms12 Levy -

that I thought we were submitting to you.

In other words, when you review this mass of evidence here, and even if you simply take their testimony, you are not going to be able to make a contract out of it. Now, what that has to do with the 7-1/2 IPS I don't know.

THE COURT: The thing is, it seems to me, there always was a kind of subsidiary issue, an issue which I guess might have circumstantial bearing whether there was a contract, and that is an issue arising from Mr. Lennon's delivery of the 7-1/2 tape in mid-November or whenever it was.

What does that mean? Does that mean that Mr. Lennon thought there was a contract? Did he indeed deliver this as a finished product? And so forth.

Now, it seems to me there is a question. Tgere is also testimony that for some of Mr. Levy's albums he obtained 7-1/2 inch tapes from other people and made records from those tapes which sold many copies. I think I could accept that and find that, and that is part of the picture. No question. But there are things of varying degrees of importance. I don't think that even you contend that that is determinative of what was said on October 8 or anything like that, nor would any of us contend that even if we assumed that, that that meant that

John Lennon had completely finished his work.

So again we are dealing with something that is part of the factual picture and there is evidence about it. But it does not seem to me that it is worth going on having lots more proof about. But that is something I think we can take care of.

I want to now focus mainly on evidence that will really help solve the problem of whether there was a contract on October 8th.

MR. PRETTYMAN: We are going to object to Mr. Garlick.

THE COURT: Why?

MR. PRETTYMAN: Well, whereas Mr. Chapman was welcome, and that is because he talks about a single matter, but in this other where their own witnesses contradict the circumstances --

MR. SCHURTMAN: Your Honor --

MR. PRETTYMAN: I listened to your recitation a moment ago and did not agree with any of it.

MR. SCHURTMAN: I did not represent anything about what your witnesses said.

MR. PRETTYMAN: Mr. Garlick spent some time in Florida with these parties. It is going to take time to show, your Honor, a negative, all the things that he did

not hear and did not understand, despite this long time that he spent down there and the impression that he got which he is going to testify about.

We think that we totally took the underpinnings out of that in his deposition, and it will take some time to demonstrate that. It is just not a question of reading Mr. Chapman's deposition in. I just have to forewarn you that that may take a little time and I don't think it goes to the issue again, as your Honor stated, of whether there is a contract, because even if you were to decide that Mr. Lennon for some reason thought he had a contract, which I cannot believe could be found on this record, it still does not solve the issue of whether there was sufficient specificity in terms of what the contract was, what the parties thought it was, and so forth, so that it could be legally enforceable in law.

THE COURT: I have to suspend. I am late for another hearing, as usual. I will do my best in the next two days to be with you full days and I will do my best to help get this over with. I will expect the same thing from the lawyers here.

Now, I can't foresee precisely down to the last witness what will be needed. I don't want to attempt to decide the issue that we have been laboring on

ms15

so long for the last ten days, where one party claims that it has not put in all its evidence. That would not be a good idea. At the same time, we got to figure out a way to wind this up.

So consider overnight evidence that is peripheral or evidence that is cumulative, and I will urge you to forego that, because we have an awful lot of evidence both direct and circumstantial, and the time comes that things really are not that telling. So you work it out. You have got to realize that at this point I don't think I am imposing upon you. I have to finish by the end of the day Friday. I think that is more than ample. So, at least, I think we have got our immediate job ahead of us, and that is that tomorrow, Mr. Schurtman, you will be prepared to cross-examine Mr. Seider and Mr. Lennon. And then I think, frankly, that is the most important part of the work by far.

MR. SCHURTMAN: And finish with Mr. Levy.

THE COURT: Yes. And after that we will look at short items which can in some way be compressed so we can get this thing over with.

Good night.

(Adjourned to Thursday, January 29, 1976, at 10.00 o'clock a.m.)

Big Seven Music Corporation, et al.

v. 75 Civ. 1116

John Lennon, et al.

NEW YORK, NEW YORK

JANUARY 29, 1976
10:00 a.m.

- - -

(Trial resumed.)

- - -

(In open court.)

MR. SCHURTMAN: Your Honor, pursuant to your instructions yesterday, we have prepared a schedule of deposition page numbers set up by subject matter.

THE COURT: You mean transcript trial page numbers.

MR. SCHURTMAN: I am sorry, transcript trial numbers. It does not include yesterday's testimony.

THE COURT: This is through the 9th day.

MR. SCHURTMAN: Right.

Now, in addition, your Honor, we have prepared a memorandum of law on the issue of whether the contract is uncertain or void for vagueness. I would like to hand that up.

I would also like to ask your Honor whether

you have seen the two pretrial memorandums that were filed before Judge Mac Mahon. I have extra copies here. They deal with the question of statute of frauds.

THE COURT: We don't need that.

MR. SCHURTMAN: They deal with the statute of frauds issue. If you want them, I have them.

THE COURT: For your side?

MR. SCHURTMAN: Yes.

MR. PRETTYMAN: Your Honor, in an effort to expedite this and speaking for all the defendants, we are prepared to raise no objectionto the marking of Mr. Chapman's deposition and the introduction of that and also the marking of Mr. Garlick's deposition and the introduction of that so that it would not be necessary to call either gentleman as witnesses before your Honor. The only --

THE COURT: You are referring to a Chapman deposition or the Chapman trial?

MR. GRUMBACH: First trial.

THE COURT: You're talking about the trial testimony before Judge Mac Mahon?

MR. PRETTYMAN: I apologize. Mr. Chapman's trial testimony and Mr. Garlick's deposition. The only caveat that we would have is that in connection with the

introduction of Mr. Chapman's testimony, we would like the opportunity to refer you specifically to a point in Mr. Kahl's testimony where he dealt with precisely the same incident. Other than that I think that would save a great deal of time and we wouldn't have to go through a long cross examination of Mr. Garlick.

MR. SCHURTMAN: I haven't been in touch with Mr. Garlick since yesterday. I do believe for the points we want to call him, it would help if your Honor heard him personally to judge his credibility. I might add, incidentally, under other circumstances, I believe Mr. Bergen is Mr. Garlick's lawyer.

But for the purposes of this particular case, I think he's without a lawyer.

MR. BERGEN: What difference does that make, Mr. Schurtman, that my firm happens to represent him?

THE COURT: If you are going to talk to each other, you can do that on plenty of other occasions.

Now, look, I can't judge whether you need Mr. Garlick live or not. Why don't you think about -- the only thing you can do and the only thing I can do is take it one step at a time. You heard the suggestion of Mr. Prettyman on behalf of the defendants and get together

with the defense lawyers and see if you can either be satisfied with the deposition or if he is going to be called live, what problems it will create and what we can do to eliminate it. But, let's just go forward now.

MR. PRETTYMAN: The only area I think that is left is this rather difficult area of industry practice. If we are going to open all that up, that, your Honor, is going to cause some difficulties because obviously we will have to show.

THE COURT: Industry practice on 7-1/2 tapes.

MR. PRETTYMAN: I think he was talking about what goes into --

MR.SCHURTMAN: If I understood your Honor's comments correctly yesterday, you have told us that it is your understanding that people sometimes make oral agreements in the industry which are followed by paper work and any additional testimony on that point would be cumulative.

If you have $50,000 deals or $100,000 deals when people think they have a deal and a handshake and then they have paper work.

THE COURT: That's exactly what I told you. Yes, I told you that. That's what I would accept.

MR. SCHURTMAN: On that point, I don't think at

least at this time there is any need to call additional witnesses unless your Honor deems it appropriate.

THE COURT: I don't want to trap anybody. What I said yesterday I mean. If I come to have some doubt on that point, I will let you know in plain English.

MR. SCHURTMAN: I would accept that, your Honor.

MR. PRETTYMAN: I don't want to get trapped here either. I assume that what you have just said carries no implication that you would necessarily have an oral deal dealing with a artist of that stature and a deal of this size.

THE COURT: Both sides, I have no doubt and believe it or not, I did some limited amount of legal work for a movie company years ago and what would happen in some cases is that there would be an oral agreement or an agreement where there was a certain amount of writing but this was a massive amount of writing to get done to meet the thing. There were all kinds of things that would go forward on that. Then sometimes a thing broke apart and it was very difficult occasionally to know what to do. What I am leading up to: I really accept the testimony of the one or two witnesses here that in an appropriate occasion people would work out in discussion what they think is an arrangement that they want to take action on,

they think is a contract. Then they can go ard. Maybe they start drafting, maybe they think they are going to put it in writing at some point hence but they go forward.

They do not want to wait for all the "i's" to be dotted and the "t's" to be crossed. I don't doubt that can occur. The reason I am saying this to both sides I think we do not have to get diverted from the real issue and that is what happened here in this case. It would be almost -- this is no possibility of convincing me or any other judge that there could never be an oral deal that people acted on in the record business.

So it is a waste of time. That doesn't really go very far -- it doesn't go any distance, I say to you, Mr. Schurtman, in demonstrating whether or not an oral deal was made in this case and that's what I'm concerned about.

MR. SCHURTMAN: I fully understand.

MR. BERGEN: Just one point. I wanted to see if we can get clear that once we start with the cross examination of Mr. Lennon and Mr. Seider that it will not be interrupted by any other witnesses. We can just go right through.

THE COURT: I don't know of any.

MR. SCHURTMAN: I'm prepared for that.

MR. PRETTYMAN: Where are we left on Mr. Garlick, we will try to get together and work it out.

MR. SCHURTMAN: I'll let you know after lunch.

THE COURT: I'd rather you talk about that a little further.

M O R R I S L E V Y, resumed.

REDIRECT EXAMINATION

BY MR. SCHURTMAN:

Q Mr. Levy, were there any TV mail order album promotions prior to September 1, 1969?

A Yes.

Q Can you name some of them?

A There were many companies in the mail order business including Crystal Corp., Tampa Marketing, Malcolm Smith, Columbia House, Longines and probably 20 or 30 more that I can't even recall the names now. It was a big business.

Q They were promoting record albums over television?

A That is correct, in mail order.

Q Now you mentioned Longines, is that the same Longines that is mentioned in the contracts we have referred to here?

A Yes, sir. Prior to them buying the Capitol

REcord Club, Longines primary business was mail order through direct mail and television prior to buying the club rights from Capitol.

Q Is there a difference between a record club and mail order?

A Yes, sir.

Q What is the difference --

MR. BERGEN: Objection, your Honor. This was not covered on cross examination of Mr. Levy. I think what they are trying to do is fix up some testimony that Mr. Klein made. I object to this. It is improper redirect.

THE COURT: Overruled.

A A record club is a negative response -- would you want me to explain that negative response?

Q What does that mean, very briefly?

A A negative response is if you join the club, you get a certain amount of this for free when you join or a very low price and then each month you get a card which says this is the selection of the month. If you don't return that card to the record club, they mail you the album and bill you the list price.

Q I think yo've already testified how other types of mail order work -- so I won't go into that again.

But you say this type of mail order existed prior to 1969?

A The regular mail order?

Q Regular mail order.

A It was a big business.

Q Now, Mr. Levy, at the October 8th 1974 meeting, did you contemplate if no EMI consent were obtained for foreign rights for retail fulfillment centers, that you would go ahead anyway with just mail order?

A Yes.

MR. GRUMBACH: Leading.

THE COURT: Let me hear the question again.

(Read.)

THE COURT: I'll overrule the objection.

Q Is it feasible and practical to promote a record album on television but to limit the promotion to mail order sales without going into retail fulfillment centers?

A Yes.

Q Have any of your companies ever handled a television package which was solely only through mail order without the use of retail fulfillment centers?

A Yes.

Q Can you name some of these packages?

A The Jackie Gleason package, the Chubby Checker, the Arthur Fiedler, Every Artist Has A Song.

Q All right.

Now, Mr. Levy, there has been testimony at this trial that the reason one uses retail fulfillment centers is that many people will not buy items by mail order. Is it nevertheless your contention that a promotion can be conducted solely through mail order?

MR. PRETTYMAN: Objection. Leading.

THE COURT: At this point I will allow this.

Mr. Levy has a right to get his position on the record on these things.

A There are many companies that are just mail order companies and never use retail fulfillment. All the

other companies I called out are strictly mail order and do nothing else but mail order, I believe. They are just pure mail order basically.

Q When Adam VIII started advertising the Roots album in February, 1975 -- that was after your meeting with Mr. Seider on January 30 -- did you intend to use only mail order in the United States or were you also going into retail fulfillment centers?

A That is February you are talking about? Only mail order.

Q Now, Mr. Levy, if you had not gone into retail fulfilment centers, but you had gone ahead and sold the Lennon album only through mail order, what is your best estimate of the number of albums and 8-track tapes that would have been sold if you had gone through with the entire promotion?

A I think I could have done a million.

Q A million albums and tapes?

A Yes.

THE COURT: Total albums and tapes?

THE WITNESS: Yes.

Q That is only mail order?

A Yes.

Q What would Mr. Lennon's royalties have been?

A In excess of $600,000.

Q What would your profits have been per album? When I say your profits, I mean Adam VIII's profits?

A Between a million eight and two million.

Q Now, was there any discussion at the October 8th meeting that you would go ahead with U.S. mail order sales alone, even if EMI's consent could not be obtained for foreign and retail fulfillment center rights?

A That is basically the deal we made, that we had a mail order deal and we would proceed as of that date and finish up the album.

THE COURT: He is asking if there is any specific discussion of your going forward with mail order only if you could not get the retail and foreign rights, in other words, any specific discussion, anything anybody said about the possibility of your going forward with mail order only in the United States?

THE WITNESS: Yes.

THE COURT: Do you recall anything that was said about that? In other words, did somebody say, "Well, if this does not go on retail it will go by mail order only? Did Mr. Lennon or Mr. Seider or May Pang say it? That is what we are asking.

THE WITNESS: That was part of the three or four

conversations that evening.

THE COURT: Tell us what part of the three or four conversations that was?

THE WITNESS: When we discussed the mail order package and I said I had knowledge that mail order rights were with Apple, there was agreement on that there. Then we discussed that Mr. Seider would go and get the rights from EMI for the retail fulfillment and the foreign, and then we still decided to go ahead. In other words, we were still going ahead, even though we were aware that Mr. Seider was going to get the rights for the fulfillment and the foreign, but we would go ahead on mail order. In precise words that is what we arrived at; that is what we proceeded to do at the end of the meeting.

Q Mr. Levy, on your cross-examination you testified that in addition to having read the Playboy interview and in addition to your negotiations with Allen Klein in 1973, you also relied on your knowledge that Mr. Lennon had distributed a regular retail album through someone other than Capitol. What was the title of that album?

A Two Virgins.

Q And through what company was that record put out?

A Tetragramaton.

Q Do you know the circumstances under which it was given to Tetragramaton?

A There was a certain cover that Mr. Lennon wnated. Capitol would not put it out based on their image and the taste of the cover. Mr. Lennon insisted on that cover. When Capitol would not put it out with that cover, Mr. Lennon and Apple licensed Tetragramaton to release that album in normal retail channels.

Q Who was Tetragramaton?

A It was a company owned by Bill Cosby and I believe Artie Mogel.

Q Now, what bearing did this information have on your negotiations with Lennon and Seider on October 8, 1975?

A I knew that Lennon and Apple had a lot of rights to do almost as they saw fit in the United States.

Q Now, you have testified previously that at the October 8, 1974 meeting Mr. Seider suggested a payment of a couple of hundred thousand dollars to cure the breach of the Come Together settlement and that you turned it down. Did you tell Mr. Seider and Mr. Lennon on October 8th that the Come Together settlement was worth more than a couple of hundred thousand dollars?

A Yes.

Q Did you tell them why?

A That it would --

THE COURT: We had this about the first hour of this testimony.

MR. BERGEN: I object.

MR. SCHURTMAN: I didn't go into detail. It was covered on cross and I now want the witness to explain to you with figures why that would have been worth more than just the mechanical royalties.

MR. BERGEN: He has already testified five to six hundred thousand dollars.

MR. SCHURTMAN: He didn't go into the details.

THE COURT: I don't know what more we want.

MR. SCHURTMAN: It will only take two minutes.

MR. GRUMBACH: Are these things Mr. Levy said to these people?

Q First, tell us what you said?

A That it was worth a lot more.

Q Did you explain why?

A Yes, that the copyright would continue to earn a lot of money over a long period of years, that it would have enhanced the mechanicals, it would have other people recording the song, the performances all over the world would go on, and there would be sheet music sales and the

value of the copyright would continue to rise and become a bigger capital asset.

MR. PRETTYMAN: This is not details.

Q Can you give the Court any specific illustrations of how this works?

A In other words, if a song is earning a hundred dollars a year over a period of eight, ten years and there is no activity in an artist of the stature of Lennon or Santana or Michael Jackson or any big artist because the song, the song will immediately start to earn money, but what is most interesting, over the life --

THE COURT: I have heard this before. I think I heard it from Mr. Kahl and Mr. Levy.

Q Do you know any specific artist where this has happened?

A Yes.

Q Name a couple?

A I prepared a couple of lists with two artists that did two of my other songs.

THE COURT: Who?

THE WITNESS: Santana and Michael Jackson recorded two of my old copyrights, and I prepared something to show the income prior to their recording and for five or six years after they recorded that song.

THE COURT: This is not a suit on the old settlement? You are not trying to recover damages on that? Do you need this?

MR. SCHURTMAN: It bears on the witness' credibility as to what happened at the October meeting. There has been testimony by Mr. Graham, for example, that he can't understand why Mr. Levy complains because he was mechanical royalties, anyway.

THE COURT: I am not going to have this. This is not a big, burning issue. I assume Mr. Levy thought that he would get more than what was stated and said so at the meeting. Let us not go into a lot of background.

MR. SCHURTMAN: Just for the record I would like to make an offer of proof on that.

I offer Plaintiffs' Exhibits 88-A and 88-B for identification for the purpose of showing that in the case of Santana and -- was it Jackson --

THE WITNESS: Michael Jackson, one of the Jackson Five.

MR. SCHURTMAN: -- that after the sheet music sales and other sales had been going along on a fairly low level, when these recordings were made those shot up.

THE COURT: Let us have them marked for identification.

(Plaintiff's Exhibits 88-A and 88-B were marked for identification.)

THE COURT: I don't mind having these in if they are not going to start new areas of inquiry by the defense, but I don't want to have a lot of inquiry about these two people.

MR. BERGEN: May I just be heard very brieflyi

I think a lot more relevant information would be what are the sheet music sales and such within the last year of You Can't Catch Me and Ya Ya. That really is the relevant information. I object to this information. I object to the testimony.

THE COURT: I will sustain the objection and you have your offer of proof.

Q Mr. Levy, were you here when Mr. Michael Graham testified that since your song Ya Ya was recorded twice by Mr. Lennon, once in the Walls and Bridges album and once in the Capitol Rock and Roll album, and since the Rock and Roll albsum also contained another Big Seven song, You Can't Catch Me, there has been full compliance with the first part of the Come Together settlement?

MR. BERGEN: Objection. This is not proper redirect. We are getting into the same area we were just talking about. If we are going to open up this area,

then I think we are going to have to explore with Mr. Levy on recross just what happened to these two songs:

Were there any sheet music sales? Were there any cover sales?

MR. SCHURTMAN: I am not addressing myself to that point.

THE COURT: I don't think you finished your question yet.

What is your question?

(Question read.)

BY MR. SCHURTMAN:

Q Do you agree with that?

A No, sir.

MR. BERGEN: I object.

THE COURT: Overruled.

MR. BERGEN: This came out on Mr. Graham's cross-examination by Mr. Schurtman.

Q Why don't you agree?

A The agreement says three different songs.

THE COURT: Now, look, we can all read the agreement.

Where is the agreement?

MR. SCHURTMAN: It is in evidence, Exhibit 12.

Q Aside from what the agreement says, are there

any other reasons?

THE COURT: Can I see the agreement?

MR. SCHURTMAN: This is the transcript of the agreement.

THE COURT: It says, "You will record three composition.s"

I don't think it is going to help me to have Mr. Levy testify. I find it very difficult to believe that two recordings of Ya Ya satisfies the language of three compositions. I will tell you that right now. I don't think you have to bother with that.

MR. SCHURTMAN: That is the only point we wanted to get in.

Q Now, you and other witnesses, Mr. Levy, have testified at this trial that there were occasions when you would pay or receive advances of $50,000 or a hundred thousand dollars for masters based on an oral agreement several months before it was reduced to writing. The defendants have suggested in their cross-examination that there is a difference between a $50,000 deal and $20 million dea.

Now, let me ask you first, what were the retail sales on some of these $50,000 or $100,000 deals, and give us some concrete illustrations?

MR. PRETTYMAN: I object. I don't understand the question.

THE COURT: I don't understand it. I told you, you don't need to belabor this.

MR. SCHURTMAN: They compare apples and oranges.

THE COURT: I tell you for the fifteenth time that if I find that there was an oral contract on October 8, 1974, that is not within the statute of frauds or covered by the statute of frauds, I won't find it contrary to industry practice. I have tried to explain that at some length.

MR. SCHURTMAN: The point I was driving at --

THE COURT: I tell you, you don't need that. I don't care about it. You don't need to bolster it.

MR. SCHURTMAN: The next question may or may not be in the same area.

Q On the October 8th Lennon deal as you have testified to it how much money was your company, Adam VIII, risking to get the package underway?

A Maybe 50, $60,000.

Q What was your understanding of how much money Lennon was risking in order to complete the package?

A He was salving $90,000 worth of what he calls dead tapes and would probably spend an additional 30,

$40,000 to complete the album.

Q Now Mr. Grumbach raised a question yesterday of whether Adam VIII was financially capable of paying Lennon's royalties. Was it?

A Yes.

MR. GRUMBACH: That was not the question I raised, and I was cut off in that examination.

THE COURT: I feel we are about the end, Mr. Schurtman. We got a long day ahead of us.

MR. SCHURTMAN: I have about ten more minutes.

THE COURT: On what?

Q Was there any discussion at the October 8th meeting as to who would do the pressing?

A No, sir.

Q Would you have objected to Capitol doing the pressing?

A No, they press for me all the time.

Q Have they pressed for you in the past?

A Yes.

Q Are they pressing for you now?

A Yes.

Q Are pressing costs the same in the industry, whether it is done by RCA or Columbia or Capitol?

A Basically the same.

Q When you make a deal for a TV album, is it an essential part of the deal to designate who would do the pressing?

A No, sir.

Q When you made the Come Together settlement there was an option of Apple to lease certain masters to you. Do you recall whether there was a provision as to who would do the pressing on the masters?

A There is no provision as to who would do the pressing.

Q Was there any provision as to who would do the covers and sleeves?

THE COURT: Can't I read?

MR. SCHURTMAN: Yes.

THE COURT: This is just argument.

Please, Mr. Schurtman, let us conclude this.

Q According to your understanding of the October 8th deal would you have permitted Mr. Lennon to participate in the preparation of the lacquer master?

A We would have welcomed it, yes, sir.

Q If Mr. Lennon had said that he would prefer in the preparation of the lacquer master to use a 15 IPS or even a 30 IPS tape for the final lacquer master, would you have objected?

A I would have let him do whatever he wanted.

Q Now, if Mr. Lennon had told you at the time the package was being released that he didn't want any other artists' albums advertised on his cover, would you have refrained from doing so?

A I certainly would have.

Q Now, one question that came up yesterday on your cross examination was Mr. Bergen read to you from page 372 of your deposition and I'll just three or four lines:

"In other words, if we are running it at a very low cost per audit, we would be doing a volume of, oh, on an album like this, 30, 40,000 pieces a week. You know, maybe even more we could stay with it right there and the maximum profit out of it."

Now is 30 or 40,000 pieces a week a regular amount of sales on an album?

A There is no regular amount of sales, Mr. Schurtman. I have had albums that have done 30, 40,000, they have done more while they peaked, they have done less. In the record business, if it is a big hot item there is really no limit to what you could do a week.

Q Well, then would it be possible for one or two million albums to be sold in less than a year?

A Absolutely, it has been done.

Q Are your companies sometimes retained on a fee

basis to supervise the putting together the TV package?

A Yes, sir.

Q What are your fees for that?

MR. GRUMBACH: I don't know what this has to do with direct.

THE COURT: This is the plaintiff in the case and if he wants to reopen the direct, I'm not going to quibble about it. As long as it is germane to the case. What is this germane to?

MR. SCHURTMAN: It shows the value of the work that Adam VIII was putting into the package and it has a bearring on whether Adam VIII thought there was a deal or not.

MR. PRETTYMAN: I object then. I don't see on either point it could show either.

THE COURT: At what time?

MR. SCHURTMAN: In 1974 how much were you being paid if you did packages on a fee basis?

MR. PRETTYMAN: He wasn't even paid.

THE COURT: What did he do in 1974 to merit any payment? There was no testimony he did anything much except consider some ads.

MR. SCHURTMAN: I'm not suggesting --

THE COURT: I don't see the relevancy of this

and I'll sustain the objection.

MR. SCHURTMAN: I will simply make an offer of proof that -- I will make the offer of proof through the witness.

Q How much does your fee with --

THE COURT: Mr. Schurtman, I sustained the objection.

Q Now, on cross examination you testified yesterday, Mr. Levy, that you did not attend the Lennon recording sessions at the Record Plant during the week of October 21st. Is it your practice to attend recording sessions when you are making other TV packages?

A It is not my practice to attend when I don't have anyone on the payroll.

Q Is it your practice --

MR. GRUMBACH: Are you being technical in saying people who are actually on the payroll as distinguished from Mr. Bailin who is a Roulette A and R man?

THE COURT: Do you wish to have recross?

MR.GRUMBACH: I'm just trying to clarify the question.

THE COURT: You can clarify it all you want on recross.

Q You were questioned yesterday about why you

didn't try to put the LennonTV package on the air before Christmas. Is it customary to buy TV commercial time between September and December?

A That is the most expensive time to buy TV time. There are very few television packages during the middle of September to the end of December because they wont' take our tape commercials.

Q Mr. Levy, I showed you Plaintiffs' Exhibit 89 for identification which was a recap that you had prepared during lunch of your U.S. mail order costs and your U.S. retail fulfillment costs, I believe defendants' counsel had looked at this exhibit overnight. I offer it again simply as a recap.

MR. BERGEN: I'd like to ask some questions on voir dire, your Honor?

THE COURT: What is the number?

MR. SCHURTMAN: Plaintiffs' Exhibit 89 for identification.

THE COURT: All right. Mr. Bergen?

VOIR DIRE EXAMINATION

BY MR. BERGEN:

Q Mr. Levy, when was this document prepared?

A At lunch yesterday.

Q Who helped you prepare it?

A I threw the figures out and both lawyers were writing, while Mr. Schurtman was eating, Mr. Kanzer wrote the numbers down. I think while Mr. Kanzer was eating, I think Mr. Schurtman wrote the numbers down.

Q Now, did either Mr. Kanzer or Mr. Schurtman ask you any questions about the figure?

A Every figure that's there there was a question asked about.

Q Okay. Now, you testified yesterday before when the Judge was questioning you, that the figures you went over with the European figures for the joint venture and then you also discussed some of the American things, is that correct?

A I don't think that was in reference to this.

Q I'm not talking about that at all.

A I'm sorry.

Q Isn't that true?

A You want to ask that question?

MR. BERGEN: Read it back.

(Read.)

A That was in reference to Mr. Graham's sheet of paper and his testimony when his Honor was questioning me.

Q I don't think the judge was questioning you about Mr. Graham's piece of paper. He was questioning you about

the meeting with Mr. Graham.

A Okay, yes.

Q Were the figures you discussed with Mr. Graham the European joint venture figures?

A I think I testified they were the European joint venture figures and we used the domestic figures at some point for comparison because I was not familiar with the cost of all the items in the European deal.

Q Now, referring to Plaintiffs' Exhibit 89 for identification, there's a figure for the jacket of 28 and 15 cents?

A That is correct, sir.

Q I read to you from your testimony yesterday, page 1727.

"THE COURT: What was said about that?

"THE WITNESS: Referring to the jacket. Between 10 and 15 cents. 10 would be closer to it when we usually make a mail order jacket."

A I think your Honor was questioning me about the Graham conversation. This was made up for actual costs, lows and highest.

THE COURT: Let me see that sheet. What is this?

THE WITNESS: This is basic low and high cost on

all activities on producing a record for mail order and for producing a record for retail fulfillment.

THE COURT: I thought it was a recap of testimony.

MR. BERGEN: That's what I thought it was supposed to be.

MR. SCHURTMAN: We don't have the specific testimony in front of us and I said, look, the figures got confusing during the testimony. Let's see if we can set them down on two columns and give me your best recollectionof thefigures.

THE COURT: Does this represent anything that was ever discussed at any meeting?

THE WITNESS: Yes, in many meetings this was discussed at the October 8th meeting when I explained some of the costs. This came in in the Graham meeting when we were trying to arrive at cost in Europe and some of these costs were thrown out at that meeting to tie it into European costs.

THE COURT: I would -- I think this subject might do more harm than good because I think that the testimony has to stand as it is as to what was actually discussed and with this in the record, I just think it would be misinterpretered. I think what we have to do is

take the record as it stands, certainly you are entitled to ask anything to supplement it, but I just don't -- I find it a little confusing.

MR. SCHURTMAN: I thought it would be helpful but I'll withdraw it. We'll take the record and make up a similar sheet based on the record.

THE COURT: All right.

MR. BERGEN: Your Honor, I spent a couple of hours this morning going over that document and comparing it to Mr. Levy's testimony yesterday and his testimony at the deposition and that document is in sharp conflict with his testimony and I believe that there was an attempt to represent to the Court that that document was a summary of Mr. Levy's testimony. It is in several respects it is no where remotely close to the way he testified.

THE COURT: It was withdrawn. Let us go on.

BY MR. SCHURTMAN:

Q Nro, Mr. Levy, when you were questioned yesterday., you were not questioned about the Graham exhibit although reference was made to it --

MR. SCHURTMAN: Can I have the Graham exhibit, 4-G.

Q I'm not going to go into detail on this,

Mr. Levy. But I simply want to ask you is that an accurate reconstruction of what was discussed at the November 18th meeting?

THE COURT: What's that?

MR. SCHURTMAN: That's Mr. Graham's reconstruction.

Q Is that an accurate reconstruction of what was discussed by you and Mr. Graham and Mr. Seider at the November 18th meeting?

A The way it is put down, no. There are bits and pieces from three different areas when they reconstructed it, they reconstructed it with bits and pieces from different area if we were talking TV mail orders one area, retail fulfillment another area and some foreign numbers. It is reconstructed from three different type deals that are put into one deal.

MR. SCHURTMAN: I have no further questions.

MR. PRETTYMAN: May we have just one moment, your Honor?

THE COURT: Yes.

RECROSS EXAMINATION

BY MR. PRETTYMAN:

Q You mentioned the Two Virgin album. That was an album put out prior to 1969, was it not?

A I could not answer that, Mr. Prettyman.

Q Are you aware of the fact that in order to put that album out Tetragramaton sought and received in writing from EMI a waiver and a specific permission to put that one album out under its own label?

A I would believe that happened but I also was aware that John Lennon wanted ti to happen, Mr. Prettyman.

Q I'm nt asking you what John Lennon wanted. I'm saying are you aware of the fact that before Tetragramaton?

THE COURT: He said he only assumed that happened. What else?

Q And since that was prior to the agreement in 1969 and Capitol was dealing directly with EMI, are you aware of the fact that no waiver therefore was necessary from Capitol?

MR. SCHURTMAN: I object to the facts representing the question. There's been no evidence on that.

THE COURT: I don't know where we are. What's the question? Did you assume a waiver was obtained from EMI?

THE WITNESS: Yes.

THE COURT: What's the last question of

Mr. Prettyman?

MR. PRETTYMAN: I don't know what purpose he was using the Two Virgin albums. I thought he was using it for the purpose that all the rights were in Apple.

THE COURT: What's your question?

Q What assumption did you make about the Two Virgin albums that related to the issues in this case?

A That when John Lennon wanted a certain album out in the United States another label, he could do it.

Q With or without written permission and waiver from EMI?

A No, sir, with permission and we were looking for the same permission. That was regular retail channels even, Mr. Prettyman. That album was released in direct competition with Capitol and sold in the normal retail stores. The thing that was -- this was just in my mind if John Lennon wanted something, he could get it.

Q Are you telling me that that album was also put out by Capitol and therefore two company were in competition at the retail level in the United States?

A I certainly did not mean to imply that, Mr. Prettyman.

Q Capitol did not put that album out at all?

A May I finish my answer? I did not mean to

imply that at all, Mr. Prettyman. What I was saying was that Tetragramaton put it out in the normal retail channels, not in mail order, in the normal mail order channels which were different than our deal. But if John Lennon wanted an album out he could make EMI and Capitol waive their rights and it comes out in normal channels. They knew he had that power.

Q Where did you get the information that Mr. Lennon made EMI waive its rights?

A Mr. Prettyman, that was one of the big topics of discussion in one of the conventions of the record business tha- when that album came out, Tetragramaton got the coup for getting that album and that was one of the reasons why they got it.

MR. PRETTYMAN: May I have this marked CK.

(Defendants' CK was marked for identification.)

Q Had you ever seen that before?

A No, sir.

Q Were you aware that it existed?

MR. SCHURTMAN: Since the witness said he never seen it before may I see it before your next question?

MR. PRETTYMAN: Sure, but he's still looking

at it.

THE COURT: What are we doing?

MR. SCHURTMAN: I took it away from the witness.

MR. PRETTYMAN: I asked him if he was aware of it.

THE WITNESS: I've never seen it before.

THE COURT: What's your question on it?

MR. PRETTYMAN: I can't operate on it. He said he never seen it before.

Q Now, Mr. Levy, you said that if there were a million sales or mail order that Mr. Lennon would get in excess of $600,000?

MR. SCHURTMAN: Why don't you take that away from Mr. Levy, I think it is distracting him.

THE COURT: Your question, Mr. Prettyman.

Q You said that if there were a million mail order sales that Mr. Lennon would receive in excess of $600,000?

A That is correct, sir.

Q That would be based on a royalty of 60 percent?

A 12 percent.

Q That would be 60 cents?

A An excess of more than $600,000 would be -- that would be 60 cents for the album, yes, Mr. Prettyman.

Q Suppose his profit for royalty per album was as shown on Exhibit GGGG, the figures noted by Mr. Graham and that Mr. Lennon was to receive 23 cents an album. His profit then on those mail orders would be somewhere in the area of $230,000?

A That figure has nothing to do when --

Q Just answer my question.

If you would assume for me --

A You want me to assume?

Q Yes. The figure would then be in the area of $230,000, right?

A If we assume that's right but it is wrong.

Q If recording costs were in the area of $200,000, he would then and he paid the recording costs -- he would then be down to $30,000, is that right?

A If we assume.

Q Then he's had to pay the 3 percent Spector royalty?

A He wouldn't pay the 3 percent Spector royalty. You have that wrong also, Mr. Prettyman.

Q Why wouldn't he?

A As I explained earlier Spector's royalties would be prorata. Spector's royalties wouldbe less than 1 percent if he has 5 of 16, it wouldbe a third of the

third and it would be below 1 percent, Mr. Prettyman.

Q In any event, he would have to pay that?

A Yes.

Q We are now down below $30,000?

A If we assume.

Q As a matter of fact, you testified in your deposition, didn't you, sir, that you contemplated $2 million mail order sale?

MR. SCHURTMAN: What deposition page?

MR. BERGEN: 368.

"Q I take it you were referring only to mail order.

"A This album could have done 2 million in mail order, I believe."

And then on page 374:

"Q So that we will be clear then, the 2 million in sales that you were referring to in paragraph 8 of your bill of iculars related solely to mail order?

"A I would say so, yes."

MR.SCHURTMAN: Why don't you read the rest of it.

MR. BERGEN: "I honestly believe we did 2 million in mail order, I believe that."

Sure.

Q Do you remember that testimony?

A Yes, sir.

MR. PRETTYMAN: Would you mark this. This is Defendants' Exhibit AR.

(Defendants' Exhibit AR was marked for identification.)

Q Would you look at paragraph 8 of this, Mr. Levy, I hope you can find it because I can't see it.

MR. PRETTYMAN: This is the plaintiffs' bill of particulars. Exhibit AR.

Q I would like you to read aloud, please, the question and the answer in paragraph 8.

A "With respect to the allegations contained in paragraph 33 set forth in detail, our plaintiffs calculated the figure of $7 million as their damages. Damages are calculated on expected sales of 2 million albums in the U.S. at a profit of $2per album plus 3 million foreign sales at a profit of a dollar per album."

Q Now, is that 2 million mail order alone or is that mail order and retail fulfillment centers?

A It could have been either way in a sense, Mr. Prettyman.

THE COURT: Not could have been. Who got that figure up? Who got the bill of particulars up that is

drafted there, stating 2 million sales? Where did that come from?

THE WITNESS: From me, sir.

THE COURT: It isn't a matter what you could have had in mind,what did you have in mind when you gave that?

THE WITNESS: I believe we could have sold 2 million records.

THE COURT: In what?

THE WITNESS: In mail order we could have have done it. It's been done --

THE COURT: Now,look, Mr. Levy, I'm concerned about this and I want you to focus carefully. When you put down that 2 million, what did you in fact have in mind, retail fulfillment, mail order, a combination of both? What did you have in mind? Or didn't you have anything in mind?

THE WITNESS: It could have been a combination of both, your Honor. I would probably say it was a combination of both.

THE COURT: That you had in mind?

THE WITNESS:Yes.

Q So that at the time you wrote this, you did apparently anticipate selling through retail fulfillment

centers?

A No, at this time I wasn't --

THE COURT: He was just drafting it for the lawsuit.

THE WITNESS: I wasn't thinking of retail fulfillment center.

Q But wereyou claiming in part for damages of retail fulfillment centers, isn't that the point of that answer?

A Well, in a way but we could have also done 2 million on mail order.

THE COURT: He has stated this is what he put down. You can draw whatever conclusions you want.

MR. PRETTYMAN: Can I ask Mr. Bergen to read one portion of the deposition?

THE COURT: Are you offering Exhibit AR?

MR. PRETTYMAN: Yes, sir.

THE COURT: I'll receive it. Any problem?

MR. SCHURTMAN: I want to see what's in it,your Honor.

MR. GRUMBACH: It is a composite, your Honor, of the man and the response.

THE COURT: That's what I understand.

MR. SCHURTMAN: No problem.

(Defendants' Exhibit AR was received in evidence.)

MR. BERGEN: I want to read this one question, your Honor, relating to that same paragraph.

"Q So that we will be clear then the 2 million in sales that you were referring to in paragraph 8. Your bill of particulars related solely to mail order?

"A I would say so, yes."

MR. SCHURTMAN: You read that before.

THE COURT: Where do we stand?

MR.BERGEN: The point is now he is claiming it is a million and he just said it could be mail order plus retail fulfillment and then he answered under oath it was solely mail order.

MR. PRETTYMAN: We have three pieces of testimony, one was a million was mail order, another that the 2 million was entirely mail order and the third there was a combination of both. It is important because of his understanding of whether retail fulfillment was part of the deal.

MR. SCHURTMAN: If we are going to argue the issue, certainly --

MR. PRETTYMAN: Your Honor asked what the point was.

MR. SCHURTMAN: We have proved retail fulfillment centers in foreign rights we would have had these additional claims.

THE COURT: I was frankly a little mystified, Mr. Schurtman because I don't want Mr. Levy trapped in any way. I asked him on the stand here what he was thinking of when he put the 2 million dollars in the bill of particulars. He didn't seem terribly sure but he ended up saying it was probably a combination of mail order and retail fulfillment. Now, apparently he said in his deposition something which is somewhat more consistent with the position now taken in the case, namely, that the contract related solely to mail order. The deposition said that the 2 million sales was strictly mail order. So --

MR. SCHURTMAN: If your Honor please, the purpose for completing, we had hoped to prove all aspects, that we had obtained consent for foreign rights and that we had obtained consent for retail fulfillment centers based on what Mr. Seider told Mr. Levy at subsequent times.

THE COURT: Everything is in the record.

MR. SCHURTMAN: Yes, I think it is.

THE COURT: Anything else, Mr. Prettyman?

MR. PRETTYMAN: Just one or two more questions,

your Honor.

Q Mr. Levy, would you tell us what percentage of your business is mail order alone with no retail fulfillment? What percentage of your business is retail fulfillment alone without mail order and which percentage is a combination of the two.

THE COURT: You have got a lot of questions in there. Just take it one at a time.

MR. PRETTYMAN: All right.

Q I want to point out the three categories that I am setting up for you.

A Yes.

THE COURT: Take it one at a time.

Q What percentage of your business is mail order only without anything have to do with retail fulfillment?

A It depends on the time of the year.

Q All right. What time of the year?

A Right now we are doing, the last four weeks since the beginning of January we are doing about a half million dollars a week pure mail order. We have no packages.

Q Can you give us percentages?

A Right now we are doing all pure mail order of approximately $500,000 a week.

Q For what percentage of your business?

A 100 percent. Right now we're running 100 percent mail order about $500,000 a week.

Q None of that profit will find itself at any time in the retail fulfillment centers?

A Maybe later I will have that option if I want to. Maybe I'm confusing you or I'm not answering properly. I'm trying to. Right now we're running pure mail order.

THE COURT: This is not very helpful. Now, look, Mr. Levy, on these record albums or whatever they are that you are selling now, do you have -- are you restricted so you cannot later sell them on retail fulfillment or do you have in each case have the right to sell them on retail fulfillment if you find that it is a business, it is a good idea?

THE WITNESS: I think -- we have the club by Checker which we are running, I think I can go retail fulfillment if I want to. The 40 Country Hits that we're selling now, I don't think I can go retail fulfillment center.

THE COURT: Why?

THE WITNESS: Because there are ten or eleven cuts that came from RCA where I believe they restrict us. I believe they restrict us to mail order only and RCA has us restricted to mail order only.

Q Is that in writing, may I ask?

A Yes. We have a package from Capitol that we are running now which we are restricted to mail order.

Q Is that in writing?

A The Capitol contract? Yes, sir.

THE COURT: What the RCA one?

THE WITNESS: The RCA is the 40 Country Greats or something like that. There are ten cuts, 40 songs but 10 or 11 of the cuts are RCA cuts. The other 29 cuts come from various record companies, your Honor.

THE COURT: In other words, you can't sell the RCA cuts retail?

THE WITNESS: Which restricts the entire album.

THE COU How about the Capitol, are there Capitol?

A They are all Capitol cuts of Jackie Gleason. I'm restricted completely on that as far as retail goes.

THE COURT: Okay.

Q Now, what percentage of your business is entirely retail fulfillment centers and never goes out of TV mail order?

MR. SCHURTMAN: Just to avoid the last difficulty. When you say percentage, percentage during what period of time?

MR. PRETTYMAN: He can tell me.

A I really don't understand how to answer it for you. I really don't follow it completely.

Q What don't you follow?

A About what percentage -- when?

Q Well, if it is different, different parts of the year, tell me.

A We were running an in-store promotion -- you know the retail fulfillment centers, we may be off the air completely on television and as far as mail order goes we might be doing tremendous sums during certain months during retail fulfillment centers. It could be various albums, Mr. Prettyman.

Q I'm trying to determine whether there is any album which at no time is put out over mail order TV and is only sold by you through retail fulfillment centers. It has no connection with mail order sales at all?

A No, I don't think so.

Q Some time or another it is connected?

A I think your question was was there ever an album that goes out retail fulfillment that was never put on mail order TV?

Q Yes.

A I think that any album that goes out retail

fulfillment was at some point on mail order TV.

MR. PRETTYMAN: That's all I have.

MR. BERGEN:I have just one question.

REDIRECT EXAMINATION

BY MR. BERGEN:

Q Mr. Levy, when you spoke to Alan Klein January or February, 1975, if Mr. Klein had told you then that Apple didn't have the mail order rights, would you still put out the record?

A I don't think my lawyer would have let me after we discussed it.

MR. BERGEN: No more questions.

RECROSS EXAMINATION

BY MR. GRUMBACH:

Q Mr. Levy, you just testified that 40 Country Goldies was the record that RCA wouldnot permit you to sell in retail fulfillment?

A No, that package has been repackaged. Which sheet have you got there?

Q Don't worry about sheet, just tell me what your testimony is.

A I want to clarify it. I would be less than truthful for you. I think I explained that one of the four packages I had I renegotiated leases because

I couldn't renegotiate the Columbia's and that's the Old Forty No. 1 Country Hits which is out on another title and I got 10 or 11 cuts from RCA from that package so I could continue to sell it. So one package has really become two packages now and I can answer that question and be lying to you.

Q Did you just testify this morning that the Arthur Fiedler package was strictly mail order?

A Yes, I think so.

Q Now, I'll show you this sheet of paper that you are interested in which is called Adam VIII Limited Sales Analysts Retail Fulfillment, Fiscal Year Ending 6-30-75. The 6 entry says Boston Pops. It shows Sales figures.

THE COURT: Had the document been marked?

MR. GRUMBACH: I would like to have it marked. Defendants' Exhibit CL.

(Defendants' Exhibit CL was marked for identification.)

MR. GRUMBACH: This was produced by us pursuant to subpoena by the plaintiffs.

THE COURT: What's your question?

MR. GRUMBACK Could you repeat my question.

(Question read.)

Q Is this a different Boston Pops album?

A Will you show me what you are talking about here?

Q The sixth entry says Boston Pops and then the column shows sales of records and tapes, and then the next column shows returns of records and tapes, and then the next column shows net sales of records and tapes, and the document is entitled Retail Fulfillment?

A Yes.

Q Now, isn't that the Arthur Fiedler package and isn't it being sold through retail fulfillment?

A It was sold once or twice through retail fulfillment.

Q Once or twice?

A Because we had called RCA and asked for permission, because it was very successful on TV, if they would allow us to try it retail fulfillment. I had forgotten about that. I will get you a letter from RCA.

Q No, that is not necessary. The Chubby Checker package was strictly mail order?

A In its original concept it was. I said that it went retail at some point.

Q You previously testified that mail order packages burn out in three or four months?

A I testified what?

Q That mail order packages burn out in three or four months?

A Could burn out in three or four months.

Q Isn't it true that the Chubby Checker package has been selling for at least a year and a half at the time of the October 8th meeting?

A At least. I think it is longer than that.

Q Strictly mail order?

A No, there was some promotion on the Chubby Checker in retail. That is one of the strongest packages ever made. It is being sold right now again mail order.

Q A new mail order?

A We have renegotiated a lot of licenses on that package. It will probably sell for 15 years.

MR. GRUMBACH: I have no further questions.

BY MR. SCHURTMAN:

Q Mr. Levy, when you told Mr. Lennon on October 8, 1974, that you would pay him a 12 per cent royalty, was there any discussion that that royalty would change depending upon your costs?

A No, sir.

MR. SCHURTMAN: No further questions.

BY MR. PRETTYMAN:

Q Let us suppose that the package would actually cost $5.98, your actual cost when you add up all your advertising and this and that, does that mean that his 12 per cent came out first, that he would be paid that, and then all of the costs you would be stuck with? You would lose on each album?

A Mr. Prettyman, I suppose that if that happened I would not put the album out.

THE COURT: You are excused, Mr. Levy.

(Witness excused.)

THE COURT: I have a group of briefs before me which have no dates. It is important to date briefs. I don't know why lawyers do that.

I hand these all back with the hope that you put dates on them, both defendants and plaintiffs. It is very important to date them.

Now, are we going to cross-examine Mr. Lennon and Mr. Seider? In which order do you want them?

MR. SCHURTMAN: Any order.

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JOHN LENNON, resumed.

THE COURT: Well, to keep everyone's morale up I am thinking of giving a prize for the most interesting witness, a prize for the shortest cross-examination; we could give you some old tugboat models or something.

Do your best, Mr. Schurtman.

MR. PRETTYMAN: I wish you had announced that at the beginning, your Honor.

MR. SCHURTMAN: Judge, will you tell the defense lawyers not to interrupt me?

THE COURT: Go ahead.

CROSS EXAMINATION

BY MR. SCHURTMAN:

Q Mr. Lennon, let us start off with your recording of Ya Ya in the Walls and Bridges album.

Do you recall that?

A Yes.

Q Did you record that as a regular recording of a song?

A Yes.

Q Who were your musicians on that recording?

A Myself and my son, one of my sons.

Q Mr. Lennon, do you recall giving an interview to a Loraine Alterman of Viva Magazine?

A Yes.

Q I show you the magazine, which we have marked Plaintiffs" Exhibit 65 for identification. In that magazine Miss or Mrs. Alterman quotes you as saying:

"But then you can get a review like the one I got for Walls and Bridges that says the best cut is Ya Ya an old rock tune which is a joke cut and it makes any praise in this review almost invalid."

Now, isn't it a fact that you told Miss Alterman that that was a joke cut?

A Yes.

Q What did you mean by a joke cut?

A It is a private joke. Nobody knew what Ya Ya meant, except for me and Morris Levy and a few other people, meaning the engineer didn't know, my son didn't know. It is a private joke.

Q That is what you meant by joke cut?

A Yes.

Q You were not referring to the fact that this was just a very brief excerpt that you and your son had done?

A No.

Q Incidentally, you did not write Ya Ya, did you?

A No.

Q Did you write all the other songs in the Walls and Bridges album?

A Yes.

Q Why did you add Ya Ya to the album?

A It was a choice between a few ad lib songs that I had done with Julie, and I thought Ya Ya was more appropriate than whatever the others were.

Q Now, at the time you recorded Ya Ya on the Walls and Bridges album did you think that you were complying with the October, 1973, Come Together settlement which had been made before Judge Griesa?

A I didn't even think about it.

Q Did you discuss it with Mr. Seider?

A No.

Q At the October 8, 1974 meeting at the Club Cavallero, Mr. Lennon, did Mr. Levy tell you that he had a company which handled TV mail orders?

A He said he was into TV.

Q Did he say he was into TV mail orders?

A I don't know that he used those words.

Q Did you know that he was in TV mail orders?

A I had a vague idea he had something to do with TV packages. I didn't know to what extent.

Q Did you know what business his company Big Seven

was in?

A Copyrights.

Q Now, at the October 8th meeting did you discuss Mr. Levy the possibility of one of his companies putting your album out on television?

A It was mentioned, yes.

Q I am asking you whether you discussed it with Mr. Levy?

A How do you mean?

Q Do you know what a discussion is?

A The subject was brought up, yes.

Q Did you say anything on the subject?

A Of what? Of putting it out with him?

Q Yes.

A I said something about putting it out. He said putting it out with him.

Q Did you disagree with him at that point?

A I was open to suggestions.

Q Did you tell him, "No, Mr. Levy, I don't want to put it out?"

A No.

Q Now, on your direct examination, Mr. Lennon, you testified that after the October 8th meeting you and Mr. Levy never discussed business again. Do you recall

that testimony?

A No, but it sounds right.

Q Now, isn't it a fact, Mr. Lennon, that you and Mr. Levy continued to discuss TV merchandising whenever you met after the October 8th meeting?

A No. Morris would talk and I would say, "Don't talk to me about it."

Q Let me read you from page 128 of your deposition taken on May 6, 1975?

"Q Did you ever discuss TV mail order with Mr. Levy?

"A Yes.

"Q When?

"A Around the period when we were meeting.

"Q Just to clarify it, is that October of 1974, Mr. Lennon?

"A Just to clarify, y ou said TV orders. Any TV orders was discussed whenever we met subsequently from that first date onwards."

Do you recall giving that testimony, Mr. Lennon?

A No, I am not sure.

Q You don't recall giving that testimony?

A No.

Q Well, somebody took it down in your deposition?

A Am I supposed to remember it?

THE COURT: Just to avoid that minor problem, I suppose technically you have to ask the witness if he gave a deposition. But Mr. Lennon is a party and you have a right to read it, and unless somebody claims that the transcript is wrong, it goes into the record.

MR. SCHURTMAN: I know. I won't pursue it, your Honor.

Q You testified on your direct examination that while Mr. Seider and Mr. Levy were talking business you were writing down songs at that October 8th meeting.

Do you recall that?

A Yes.

Q What did you write the songs on?

A Paper, I guess.

Q What did you do with the paper on which you wrote the songs?

A I don't know, but I more than likely probably gave it to May Pang or thrown it away. I have no idea.

Q Mr. Lennon, you testified on your direct examination that you got the missing Spector tapes back in July. Do you recall that?

A I remember getting them back just before I made

Walls and Bridges. I don't remember the date.

Q Isn't it true that by the time of the October 8th meeting after you regained the Spector tapes you had lost your enthusiasm for this Oldies and Goldies album?

A No. I was tired from overwork.

Q Isn't it true that you told Mr. Levy at the October 8th meeting that you were trying to salvage the Spector tapes, but that you were disgusted with the project?

A No, disgusted is not my kind of language.

Q Isn't it true that you told Mr. Levy that you had lost all desire to complete the album?

A No. I was tired. And I did fear that perhaps it was little late for an Oldies package.

Q You did tell Mr. Levy, didn't you, that the timing was all off?

A I was afraid that it was a little late for an Oldies package because somebody had done Bonie Maronie between me doing it and putting it out. I was worried about that. I am always worried.

Q Did you tell Mr. Levy that the delay created by the Spector difficulty made it inappropriate to complete the album?

A No.

Q Did you tell Mr. Levy that the Spector tapes were not of top caliber as presently constituted?

A I don't know. I never would talk like that. Some of them are lousy and some of them were okay.

Q Did you tell Mr. Levy that you did not like the work product, your work product to lie in a can?

A That is right. I don't like stuff to be in a can.

Q Did you tell Mr. Levy that you had lost interest in the album?

A No.

MR. SCHURTMAN: Your Honor, I have read Mr. Seider's deposition testimony in when Miss May Pang was cross-examined. I have been quoting from Mr. Seider' deposition on all these points. If you think it is appropriate, I will reread it to Mr. Lennon, but it is in the record.

THE COURT: I must say to you Mr. Seider is going to phrase things in his way, Mr. Lennon is going to phrase things in his way, Mr. Levy is going to phrase things in his way and so forth. I don't know the purpose of reading somebody else's language and asking Mr. Lennon if he said this.

MR. SCHURTMAN: I am not asking him for the

precise words.

THE COURT: That is exactly what you were asking him about. Let us go on to something else. I don't think it is helpful. It is not a helpful process.

Q Let me ask you, Mr. Lennon, in your own words. You had said you were tired of the project at the time of the October 8th meeting?

A No, I had a hard year; I was tired, period.

Q Did something happen at the October 8th meeting which rekindled your enthusiasm?

A You could say that.

Q Now, what happened at that meeting that rekindled your enthusiasm for the album?

A I could see that Morris Levy would not be satisfied unless this stuff went out as quick as I could put it together. So once that decision had been made I knew that the best way to get rid of the whole thing was to do it and get it over with.

Q Well, was it anything that Mr. Levy said about television merchandising that rekindled your enthusiasm?

A I must say I was interested in his statements that we could sell six or seven million albums via TV.

Q Prior to the October 8th meeting had you

discussed the possibility of putting it out as a television package with EMI?

A No, I had not talked to EMI.

Q Had you discussed it with Capitol?

THE COURT: You are saying TV package.

THE WITNESS: No, I had not discussed it with Capital. I had discussed it.

THE COURT: With whom?

THE WITNESS: The engineers at Record Plant and possibly anybody that would be around me.

Q When you started to rehearse and record the album --

A This new part of it or the old part?

Q The new part -- was it in your mind that you were recording it for a television package or for regular retail distribution?

A Well, I was still open then.

Q Mr. Lennon, you testified in this trial that you generally only put 10 songs on an album?

A But to me 10 songs means time. If I could put 400 songs on, as long as they got on the 20 minutes a side I would be happy, but it just s- happens that 20 minutes usually allows about 10 songs to an album.

Q Obviously 400 is an exaggeration?

A I am sorry. What I mean is it is the time that counts, not the amount of songs, meaning if I made each song 5 minutes or ten minutes long, I would only get two songs; if I made them one minute each, I would get however many that adds up to.

Q Isn't it a fact that all of your prior albums had an average of 10 songs on them?

A All of my prior individual albums, yes.

Q Now, in this case you were recording 15 or 16 songs. Does that indicate that you were deliberately recording this album as a TV package?

A The Beatles' practice was to record 14 songs on a side in England, and it was not specifically meaning it is going on TV just because you have 14 songs on it.

Q You testified on your direct examination that at this October 8th meeting your feeling was that you wanted everyone to be happy?

A Yes.

Q What did you mean by that?

A I wanted Morris to be happy and the record company to be happy, me to be happy, Spector to be happy, Spector to be happy, everybody satisfied with the result of my going into the studio and working.

Q Was it your view at the October 8th meeting

that you could keep everyone happy by completing the album, by adding new songs to the Spector tapes and putting it out as a TV package with Mr. Levy?

A That was a possibility.

Q Isn't it a fact, Mr. Lennon, that you had every intention of marketing the album on television until January 28, 1975, when Mr. Coury and the other Capitol people talked you out of it?

A My intentions were to tell Capitol and EMI that I would like to do that if it suited them. As long as they go out, I get paid, anyway.

Q Mr. Lennon, until that January 28th meeting at the Sherry Netherlands Hotel, who did you think was going to sell your album by television mail order, if, in fact, it was sold by television?

A It would have suited me fine for Morris Levy to put it out or K-Tel or anybody. That is what I am saying. I don't mind who put the records out as long as they pay me.

Q Well, isn't it a fact that you had the idea of working on this album with Mr. Levy until Mr. Coury talked you out of it on January 28th?

A Well, I mentioned Morris was a front runner for TV packaging. I mean, if it was going to go on TV,

I would have preferred Morris to have it.

Q Has Capitol ever put out an album for TV mail order sales that you know?

A Not of a new product. Old product, I think they have, yes, Beach Boys, I seem to remember.

Q You testified that you were thinking at least of the possibility of having Mr. Levy put out this TV album until January 28. Did you have any understanding as to what your royalty would be if that were done?

A There is no discussion on my royalty. It is set by my contract, and unless it is renegotiated or the contract ends, I don't have any say in it.

Q Did you have any information or understanding that the royalty would be 12 per cent?

MR. BERGEN: With whom?

MR. SCHURTMAN: The royalty that Mr. Levy's company would pay him if he went ahead and put out the package with Mr. Levy.

THE WITNESS: My understanding whether it went on TV or not has nothing to do with the royalty. I didn't understand that Mr. Levy would be paying me. I presumed that EMI would still be paying me. I don't know how they would have worked it out with Morris, but the record company pays me, not Morris Levy. It is like Korvettes

or a record shop, they don't pay me in selling the record. EMI pays it, but they somehow have a deal between themselves.

Q You heard some testimony about an album entitled Two Virgins that was put out through Tetragramaton. Who paid you on that album?

A I suppose they did, but EMI refused to put that album out, and that is why it ended up on other people's labels. I did not particularly want it on Tetragramaton. I never heard of them. EMI refused point blank to handle it. It was not a pop record.

Q But your understanding is that you were then paid by Tetragramaton?

A I suppose tbey paid me, but I don't know. I have no proof. I don't go around reading record royalty statements; I have no proof that EMI paid me. Somehow, I am given the money, and hopefully it ends up in my bank account.

Q You are not concerned with money details?

A Somehow the money gets to me.

Q You have told us several times that business aspects don't concern you. Let me ask you about The Beatles' settlement.

Isn't it a fact that you had Mr. Seider come

down to Florida at the end of December, 1974, and spend several days with you explaining each term of The Beatles' settlement?

A I was only in Florida for five days and Harold Seider was there for two, and we spent one day on the settlement, which had been going on for three years, which I still didn't understand, even to this day, and I asked him, "Try and explain it to me one more time. It is beyond my ability of understanding it." But I did the best I could to sign something that was far more important than Morris Levy's album deal.

Q You asked Mr. Seider to explain it to you in detail?

A He read it to me for the hundredth time and I tried to understand what was going on.

Q Incidentally, were you here when Mr. Allen Klein testified about the 1969 agreement being read to, I think, three of The Beatles, including yourself, in England?

A Yes, I have been here every day.

Q Do you recall Mr. Klein testifying of being in England and having that agreement read to you?

A No, not at all.

Q You have no recollection of that?

A No, I don't.

Q Are you saying you can't recall one way or the other or it did not happen?

A I have no clue about it at all.

Q Did you know how much Mr. Spector was entitled to receive if any of his tapes were used in an album?

MR. GRUMBACH: What time?

Q Did you know it as of October 8, 1974?

A I am not sure what Spector gets. Actually, let me explain it, before this album EMI somehow had a deal which every producer who produced a Beatle song got, a negligible sum of money, and they locked it into the agreement years ago. So whoever produced us got whatever EMI gave them.

Now, when Spector grabbed the tapes or kept them, he had heard that Richard Perry had got more money from Ringo, and Ringo had somehow made a deal with him or with the record company where he got more.

Spector heard about this, and I think he insisted he get the same as Richard Perry, and I think he got more than EMI would normally give to producers, but I don't know what it was. 3 per cent I heard since we came in here.

THE COURT: Let us take a break.

(Recess.)

MR. GRUMBACH: I omitted this exhibit that was marked during Mr. Levy's examination put in evidence. This is Defendants' CL.

MR.SCHURTMAN: No objection.

THE COURT: All right, received. What it is I don't recall.

MR. GRUMBACH: This is the retail sales analysts for Adam VIII.

MR. SCHURTMAN: We didn't put the Viva magazine in evidence. I think Mr. Lennon confirmed the portion I read to him.

THE COURT: If you want it in evidence, I don't care.

MR. SCHURTMAN: If there is no objection I offer Plaintiffs' Exhibit 65.

(Plaintiffs'Exhibit 65 was received in evidence.)

THE COURT: Haven't you gotten what is necessary out of that?

CROSS EXAMINATION

BY MR. SCHURTMAN:

Q Mr. Lennon, that night on January 28, 1975, that was the meeting first at Gallagher's Steak House and the Sherry Netherlands Hotel, you remember that?

A Yes, sir.

Q Now when Mr. Coury talked you out of doing the TV package with Mr. Levy.

A With anybody.

MR. BERGEN: Objection. I don't think that's what the testimony is.

THE COURT: Let's be a little more careful. At the meeting and he remembers the meeting. What is your question?

Q Did you or Harold Seider or Mr. Coury or anyone refer to the fact that Mr. Levy claimed that he had an agreement to make your album?

A I don't remember that coming up at all, no.

Q Were you aware of the fact that Mr. Levy was making such a claim?

A No. I don't think anybody was claiming anything then. Mr. Levy didn't know one wah or the other.

Q Had Mr. Seider or your lawyers or anyone told you about a letter from Mr. Levy to Mr. Dolgenos dated January 9, 1975 in which Mr. Levy claimed that he had a contact with you?

A I have vague recollections of a letter from Morris but when it was or what it was about, I don't remember.

Q Mr. Lennon, I show you Plaintiffs' Exhibit 31 in evidence which is the January 9, 1975 letter. Have you ever seen this before?

A No, I don't think they ever showed it to me.

Q Did Mr. Seider ever tell you that such a letter had been received?

A Like I say, I vaguely remember something about Morris sending a letter, but what it was in reference to what, I don't know.

Q Well, was anything said at this January 28th meeting by anyone about what, if anything, should be done about Mr. Levy?

A I don't really remember what was discussed about Morris that night because my whole thing was about the album and the cover and after I had said my bit and Al Coury said his bit the night was done. We got down to the cover and the packaging and billboards and stuff like that. I wouldn't, you know, remember it.

Q Let us backtrack.

When was the first time that you learned from anyone that Mr. Levy claimed that you had given him an agreement to merchandise your album on television?

A The first time it really enters my head that he was claiming anything was when I heard he was putting

the 7-1/2 tape out as an album.

Q Isn't it a fact, Mr. Lennon that Alan Klein told you as far back as November, 1974 that he had heard that you were doing the album for Morris Levy?

A You mean when I went to see Alan? And he said Morris had been ringing about copyrights?

Q Yes.

A But that was about copyrights.

Q Didn't Mr. Klein tell you at that time that he had heard that you were doing the album for Morris Levy?

A His words were something like"I hear you're doing business with Morris Levy." I said, How do you know?"

He said, "Because he rang me about Bring It On Home To Me"which Alan Klein owned.

THE COURT: What did you answer, again, Mr. Lennon?

THE WITNESS: To Alan Klein.

THE COURT: Yes.

THE WITNESS: He said he had been doing business with Morris Levy and something to the effect he wouldn't do it or whatever. Morris had called him about "Bring It On Home To Me which I was completely surprised about. As far as I knew, it had nothing to do with Morris. I just said, "Oh, we weren't there that long."

I said, Alan, I actually don't care who puts it out. He knows how I feel about the records.

Q Mr. Lennon, a few days ago you testified on your direct examination at page 929 about the meeting with Mr. Klein and you testified that Mr. Klein said, "I hear you were doing an album with Morris Levy?"

Does that refresh your recollection about what Mr. Klein said?

A I don't remember what Klein said but it was very casual and I was more surprised, my raction to him knowing anything about anything was my surprise. Klein likes to do things for dramatic effect and what he said I don't know. He said something like that.

Q All right.

Now, after the October 8th meeting, did you do any work with May Pang and Philip Kahl pulling songs together, old records?

A Phil was helping May. I didn't do any work with Phil Kahl.

Q Had you told May at the October 8th meeting to work with Phil on that?

A Phil Kahl is a man that takes his watch off if you look at it and if you want a piece of paper he will go get it and that's what happened.

Phil Kahl said "I'll get the sheet music, I'll get the sheet music."

I said "Okay, May, he's going to get the sheet music, let him do it."

MR. SCHURTMAN: At this point I would like the witness to answer my question. May I have the question read back.

(Read.)

MR. GRUMBACH: The answer was perfectly responsive.

THE COURT: Let's hear the answer. Just have the reporter read it back.

(Read.)

THE COURT: Next question.

Q I believe you testified that after you wrote down some songs on scraps of pieces of paper at the meeting, you may have gave them to May.

Did there come a time when May typed up a list of songs you wanted to include in the album?

A I think a list was typed at one time or another, yes. I make many lists.

Q All right. Let me show you Plaintiffs' Exhibit 24 in evidence and I simply want you to confirm that the songs at the bottom with the exception of Ya Ya are in

your handwriting?

A Yes.

Q Are the check marks and the various circles also yours?

A I don't think so. It is not my style of blotting. I think we went through this once. The ticks and the blobs, I don't know it doesn't look like me. I do stars. I don't really no, okay.

Q What were the ticks intended to designate?

A I'm liable to tick things meaning okay but these blobs I don't know. That looks like me, the crosses next to them. That's what I do. These little crosses.

Q You mean the cross behind the words "Rip it up" and behind "Ready Teddy"?

A Yes. These look somebody else did them. It looks like the same pen that wrote Ya Ya.

Q I suggest to you they don't but it is your testimony.

Just tell me, when you made the checkmarks or tics.

A I didn't say I made them. I said I possibly made them.

Q If you possibly made them, do you know what

they were possibly intended for?

A As a positive as opposed to negative. I don't know. I scribble all the time. It is meaningless.

Q Did you or May give this sheet to Mr. Levy or Mr. Kahl at a meeting atthe Club Cavallero?

A I don't know. May may have given it to them and I've forgotten that. It is just a piece of paper.

Q Just one last question.

The words "This stuff is in the can" I assume is your handwriting?

A Yes, that's the same.

Q Now, Mr. Lennon, when you were up at Mr. Levy's farm for the rehearsals, did you or Mr. Levy or the musicians discuss what kind of an album you were rehearing for?

A No.

Q Are you telling the Court that during the entire four-day weekend no one,neither you nor Mr. Levy nor the musicans discussed this album that you were rehearsing even once?

MR.BERGEN: Objection to the form of the question, your Honor. It wasn't a four-day weekend.

MR.SCHURTMAN: I'll amend it. It was but I'll amend it to three-day weekend.

MR. BERGEN: Objection, your Honor.

THE COURT: Just get your question more general. In other words, you're talking about the time that he was at the farm.

MR. SCHURTMAN: I'll rephrase the question.

Q Are you telling the Court, Mr. Lennon, that during that entire weekend no one,neither you nor the musicians nro Mr. Levy nor the guests in your presence, ever discussed the album that you were rehearsing for?

A Only discussed the music amongstourselves. Three of the musicians had been on the original tracks. There was nothing to discuss the music. It's like being in a bath and you don't discuss it. You're having a bath.

Q Did you tell the musicians what this album was going to be used for?

A They don't mind. Three of them were on the original Spector tracks. They don't discuss what it was used for. They are just working.

Q Did you tell them that the album was intended for television?

A I don't recall them asking me or me telling them or when they knew about it or did they have any idea about the TV thing.

Q Mr. Lennon, were you in court during the first

trial before Judge Mac Mahon when a gentleman named William Chapman testified?

A Yes.

Q Did you recognize Mr. Chapman?

A Vaguely.

Q Was he up at the farm during the rehearsals?

A Well, that's what he said. So I guess he was.

Q Did you have a conversation with Mr. Chapman up at the farm?

A He might have spoken to me. I wouldn't call it a conversation. I don't remember him until he came to the court. I didn't remember him until he sat in court.

Q Mr. Chapman testified as follows and I'd like to ask you about his testimony. He testified at page 6.

"Q Did Mr. Lennon state to you what he was doing at the farm?

"A Yes, he did. It occurred shortly after I arrived I was standing in front of the fireplace trying to warm myself. Morris is not the best man at interviewing people and I had not met Lennon or May Pang at that time. John Lennon came over, introduced himself to me. He said that as long as we are here, we should know each other's name.

I gave him my name and he gave me his. I asked him what he was doing there. He said I am making a record for Morris."

Does that refresh your recollection as to a conversation with Mr. Chapman?

MR. BERGEN: Your Honor, may we have Mr. Kahl's testimony read into the record too where he said it was Mr. Levy who told Mr. Chapman?

THE COURT: Mr. Bergen, that is entirely improper. This is cross examination. Mr. Schurtman has the right -- that kind of interruption is completely uncalled for.

Go ahead, Mr. Lennon.

A No, I didn't. I don't introduce myself to people, mainly because A, they know who I am and B, I'm shy and if people want to talk to me they come over and talk.

Q So, you deny this conversation took place?

A Yes.

Q Were you here when Mr. Jerry Masucci testified?

A Which one was that? I don't know which is which.

Q He's the president of Fania Records?

A Oh, that one. I have been here every day.

Q Was he at the farm during that rehearsal weekend?

A I don't know if he was there for all the time but he was around, yes.

Q Did you have any discussions with Mr. Masucci?

A No. He might have spoken to me and I might have answered him but it was all small talk and I wasn't too aware of all those hundreds of people that were wandering around the farm.

Q Now, Mr. Masucci testified at page 380 and I will quote his testimony:

"Q Did Mr. Lennon state in words or substance for whom he was recording the album in question?

"A Yes, he did.

"Q What did he say?

"A He said the album was going to be for Mr. Levy.

"Q Was there any discussion about price?

"A Yes, there was.

"Q What was said and by whom?

"A I think Mr. Levy said it was going to be a 4.98 album.

"Q Was that said in Mr. Lennon's presence?

"A Yes, it was."

Does that refresh your recollection?

A No.

Q Do you deny there was such a conversation?

A I have no idea. People were all over the place. There were about 50 people wandering around talking. I'm supposed to remember what Morris said to his friend?

Q Mr. Lennon, you were in court when Mr. Frankie Crocker, the disc jockey testified, weren't you?

A Yes.

Q Let me ask you, first, do you recall meeting Mr. Crocker?

A Yes.

Q You met him at the Club Cavallero, did you not?

A Yes.

Q Did you have any discussion with Mr. Crocker about the Rock and Roll album?

A He said something to the effect that I was recording an oldies album -- yes, we discussed the album.

Q Was anything said about you making the album for Mr. Levy?

A No, not as far as I know.

Q You have no recollection of that?

A Idon't go around saying I'm making an album

for somebody. I'm either working or I'm not working.

Q Did Mr. Levy say in your presence to Mr. Crocker that you were making an album for him?

A I don't remember Morris saying anything actually. I just remember being with Mr. Crocker most of the time by myself.

Q During that discussion, did you refer to the album as Morris' album or Mr. Levy's album?

A No.

Q Did anyone refer to it that way in your area?

A Not that way. I always referred toit as the Spector album or the Oldies album, even now.

Q Mr. Lennon, do you deny that anything was said during that meeting with Mr. Crocker, either by you or by Mr. Levy in your presence that this is an album that you were making for Mr. Levy?

A I deny saying it msyelf.

Q Do you deny hearing it?

A Yes. I don't remember hearing it.

Q Was there any discussion about the price of the album during that meeting with Mr. Crocker?

A I don't remember.

Q Do you recall --

A I don't see why they would be talking about

prices to this DJ.

Q Let me answer your question.

Do you recall a discussion about the album being so good that even disc jockeys would have to pay for it?

A I vaguely remember and it is enhanced by the testimony that's gone on for the last two weeks that Morris made some crack about making either Frankie or DJs pay for this album.

Q Did Mr. Crocker ask you for an interview?

A I don't know whether he asked or the subject came up or whatever. But he was interested in being the first one to play the album. Most of the discussion was about the black artists who originally made the records and my interest in rhythm and blues and rock and roll and the influence of black people on the Beatles. That was the main discussion.

Q Do you know Mr. Lew Garlick?

A Yes, sir.

Q Who is he?

A He's some guy that had an apartment in Florida and he's a friend of Morris' and he has something to do with printing album covers.

Q Did you stay in Mr. Garlick's building in

Florida?

A I don't know if it was his building, it seemed to be a hotel.

Q Well, the same building?

A Yes, he apparently had this room for his daughter and he allowed me to use it.

Q Did you have any conversations with Mr. Garlick?

A Abou what?

Q About anything.

A There's lots of small talk.

Q Did you have any conversation with him about the rock and roll album you were making?

A I can't deny it, but I don't remember any of it.

Q Did you tell him in words and substance that you and Levy were working on an album?

A No.

Q Now, Mr. Lennon, you testified on your direct examination that the New York portion of the recording of the album, the one that was done in October of 1974, was done with 8 musicians. Who were -- I know we have the names of five musicians who were up at the farm. We have your name. That makes six. Who were the other two?

A There was more than anotehr two. Actually there was the sax players. There were about five of them.

Q Could you give me their names?

A I can't remember them offhand. One was Bobby Kices . The others, I don't recall their names offhand.

Q Now, have you discussed this litigation, this case, with any of the musicians including the ones who were up at the farm?

A Only -- we've talked about it, when Jesse and Eddie were here.

Q When Jessie and Eddie were here, did you talk to them before they testified?

A Yes, but not about the case.

Q Did you talk to them about the case afterwards?

A Not really. WE laughed about their testimony and the way musicians live, et cetera, et cetera. No details.

Q Have you spoken to any of the other musicians who were up at the farm?

A No.

Q Ken Asher,for example?

A I don't think I have seen him since the sessions.

Q All right.

Do you recall giving a radio interview in February, 1975 on WNEW-FM?

A Was this the one playing the rock and roll album?

Q Yes.

A Yes.

Q During that interview, did you say anything about Adam VIII's Roots' album?

A I think a listener asked me something about it and I made a comment on it, yes.

Q Did you say that Roots was not the real album?

A Words to that effect, yes.

Q Was that broadcast arranged by Capitol?

A I guess so, yes.

Q Wasn't it Bob Edison of Capitol who arranged for the interview?

A Most likely, yes.

Q Now, Mr. Lennon, you have testified, I think, on your direct examination that whenever you accepted an invitation from Mr. Levy to the club, to the farm, or to Florida, he sort of twisted your arm to make you come and you just couldn't say no?

A Yes.

Q Is that a fair substance of your testimony?

A Pretty much like that, yes.

Q All right.

Now, isn't it a fact, Mr. Lennon, that you and Mr. Levy became personally quite friendly during the period from October to December, 1974?

A I was intrigued by him as a character. That's one way of putting it.

Q You saw him frequently on a social basis, didn't you?

A Well, to me anything outside of my own house is business. I don't go to dinner with people much for fun. It is business.

Q So when you had your dinner meetings with Mr. Levy at Cavallero,these were business meetings?

A It's like business, it is all business. That's what you write to the taxman, business meeting.

Q Did you give Mr. Levy little gifts and autographs?

A Id on't know. If he asked for them, I would have given them to him, yes.

Q Let me show you a couple. For example I show you Plaintiffs' Exhibit 90 for identification. Do you recall seing that?

A Yes. I thought Lew Garlick asked for this, not Morris. It was Lew Garlick.

Q It was Lew Garlick?

A I think so, yes. I think they bought these in Florida and asked me to sign them.

THE COURT: What's the number?

MR. SCHURTMAN: Plaintiffs' Exhibit 90.

MR. SCHURTMAN: We're looking for the page in Plaintiffs' 90.

Q Let me show you Plaintiffs' Exhibit 91, do you recall that?

A No. The Sex Maniacs Diary.

Q You don't recall giving that to Mr. Levy?

A No. I remember the book.

Q Do you recall autographing it for Mr. Levy?

A Autographs don't stick in my mind. You know, I do millions of them.

Q Well, is this your handwriting on the first page of Plaintiffs' Exhibit 91?

A I'm not denying I signed the book, but I don't remember it. It's not important to me that I gave him my autograph.

MR. SCHURTMAN: I offer this as Plaintiffs' Exhibit 91.

THE COURT: All right. Received.

(Plaintiffs' Exhibit 91 was received in evidence.)

MR. PRETTYMAN: You said that so fast. I didn't get a chance to say for the record --

THE COURT: I didn't think there was any problem.

MR. PRETTYMAN: Just on grounds of relevance.

THE COURT: I'll receive it.

Q On that same point I show you page 284 of Plaitniffs' Exhibit 90 which is a picture of the Beatles, did you autograph that picture?

A Yes.

Q Now, you say on there, "To Maurice," did you mean Morris?

A yes.

Q "With love, ten years later," signed "John"?

A Yes.

Q What did the "ten years later" refer to?

A Morris had somehow had some vague connection with the pool in which the Beatles were swimming. I don't know if it was true, either owned or knew the man that let the Beatles sing in the pool in 1964. To him it was a big event, to me it was a big nothing.

MR.SCHURTMAN: I offer Plaintiffs' Exhibit 90 in evidence. MR. PRETTYMAN: Same objection.

THE COURT: I will receive it.

(Plaintiffs' Exhibit 90 was received in evidence.)

Q Did Mr. Levy twist your arm to give him these autographs and gifts?

A I'll give autographs to anybody that asks provided I'm not eating.

Q Remind me to get your autograph at the end of the trial.

A You've had it. Your daughter had it.

Q I'm not responsible for my daughter's taste.

A No comment.

MR. GRUMBACH: Will you note my objection to the last remark.

MR.SCHURTMAN: I withdraw it. I withdraw it if it is inappropriate.

Q When you were at at the farm, did you meet a lawyer named Norman Sheresky?

A I don't know. I don't remember the name.

Q Would it refresh your recollection if I told you he was a divorce lawyer?

A He's another of the grayhaired men but he appeared

on the farm and in Florida, right, I remember him.

Q Did you have any conversations with Mr. Sheresky about the album?

A No, but I did a lot of listening to Mr. Sheresky.

Q What did you discuss?

A I nodded as he drank and said don't leave. Saturday night was the night I was leaving. He said don't leave me here with these people. I said youwork with them.

Q I don't want to get into your personal life, but didn't you discuss divorce matters with Mr. Sheresky?

A I don't know. It was the last night in Florida. I was leaving. I was packed and ready to go and this was the last supper. I was ready to go. We might have discussed divorce if that's what was brought up.

Q As a matter of fact you were discussing your possible divorce, doesn't that --

MR. BERGEN: Objection. What relevance does that have?

MR. SCHURTMAN: The witness is being very flippant about that conversation.

A I'm telling you what I remember.

Q Do you remember telling Mr. Sheresky at the farm and again in Florida that you were working on an album

with Mr. Levy?

A No.

Q Mr. Lennon, let me show you Plaintiffs' Exhibit 34 which is the Adam VIII Roots album, I want to ask you a few questions about it.

A Yes.

Q Now, on your direct testimony, Mr. Lennon, you gave several reasons why you didn't like the cover of that album?

A Yes.

Q First you testified the picture is out of focus. Have you ever put out any album covers where the picture was out of focus?

A Offhand, I don't remember. But nothing looked as bad as this. I mean I wouldn't use this. It is a lousy picture of me.

Q We'll get to nothing looked as bad as that.

A It is my opinion and it is my album.

Q Now, you also testified on your direct examination that this is an old picture of you?

A Yes.

Q Isn't it a fact, Mr. Lennon, that is pretty much as you looked in the winter of 1974 and 1975, before you cut your hair?

A I wish I did.

Q When did you cut your hair, by the way?

A I tried to do it on New Year's Day but I believe it was the day after.

Q Isn't it a fact you cut your hair for purposes of this trial?

A Rubbish. I cut it every 18 months.

Q Now, let's see how you looked in December, 1974. I show you Plaintiffs' Exhibit 92, the Palm Beach Daily News -- actually January 5, 1975. The picture was taken in December. Is that a picture of you and Mrs. Garlick?

A Yes.

Q Is that a fair representation of what you looked like then?

A Yes.

MR. SCHURTMAN: I offer Plaintiffs' -- let me show you a couple of others and I offer them.

A This is old, because this is an old outfit.

MR. SCHURTMAN: Mr. Lennon,I'm doing the questions.

A Obviously it is me.

MR. SCHURTMAN: I know it is you. The question is what you loo d like.

Q Take a look at Plaintiffs' Exhibit 93. Is that

what you looked like in December, 1974?

A Yes.

Q And finally take a look at Plaintiffs' Exhibit 94, is that what you looked like?

A Yes. Different length hair. Each picture is a different length.

MR. SCHURTMAN: I offer 92 and 93 and 94 in evidence.

MR.PRETTYMAN: Same objection for the same reason, your Honor.

MR. BERGEN: Objecton.

THE COURT: I'll receive them.

(Plaintiffs' Exhibits 92, 93 and 94 were received in evidence.)

Q Now, getting back to the out of focus issue, for a minute, I show you Plaintiffs' Exhibits 95 and 96 for identification.

A Yes, this is a picture of me as a child and it was the only print we had and we had to blow it up. This is when I'm aged three.

Q You're talking about 95. Do you consider 96 in focus?

A This is short hair by the way. Do you see that? This is a Polaroid and I made this album by

hand with scissors and its called -- what's the word when you do it?

Q Collage?

A Collage and I made it by hand and I used a picture of me. But it is not a bit picture of me out of focus.

Q Is it out of focus?

A The cover, no. The cover is not out of focus. It is clear as a bell.

THE COURT: This is all fun but --

MR. SCHURTMAN: I offer 95 and 96.

THE COURT: We have business to conduct. The main point and I don't know that it is going to settle the case because no one point settles a case, is that Mr. Lennon says he did not approve the presentation of that picture on the Roots album. Nobody contends he did.

Now, that's not even in issue.

MR. SCHURTMAN: I will tell you what the defendants have placed in issue if they are willing to withdraw that issue at this time, then we can stop. They have put into issue the good taste of the Roots album cover and they said the cover was in bad taste and I believe I have to pursue that point as long as it is in issue.

THE COURT:: Is this a counterclaim? I'm not trying to really focus --

MR. PRETTYMAN: We're not withdrawing anything.

THE COURT: I'm asking you if this relates to a counterclaim. We have got to go through all this trivia in comparing this picture with Time Magazine which strikes me as really a ridiculous thing. To take up the time of busy people with it. But if we're -- if that's something raised in a counterclaim on behalf of Mr. Lennon I've got to hear it.

MR. SCHURTMAN: It is.

THE COURT: All right.

MR. PRETTYMAN: Also on behalf of Capitol.

Q Now, Mr. Lennon, when you testified in your direct examination your counsel put into evidence a photograph of your other albums, and you testified as to the pains you personally took in preparing these covers?

A Yes, I believe so.

Q Now, what are your views on the Adam VIII cover?

A I think it is crummy.

Q You think it is in bad taste?

A Yes, I do, very bad taste.

Q Mr. Lennon, we have had here testimony previously about the Two Virgins album, which was put out by Tetragramaton because EMI would not handle it?

A Right.

Q At this point I am going to show you that album, Plaintiff's Exhibit 3-A for identification.

I ask you whether you approved that cover?

A Yes, I approved it; I took the photograph myself; I approved every detail of it; I am very proud of it.

Where did you get it? It is very rare.

MR. SCHURTMAN: I offer Plaintiffs' Exhibit 3-A

in evidence.

THE WITNESS: This was the one that was being waved around.

THE COURT: Is there any objection?

THE WITNESS: It has the front and back of me and my wife.

MR. BERGEN: No objection, your Honor.

THE COURT: Received.

(Plaintiffs' Exhibit 3-A was received in evidence.)

xx Q Were you of the opinion, Mr. Lennon, that this cover enhanced your reputation as an artist?

A Yes, I have no shame about nakedness, and I do not think it is bad taste to be naked, otherwise every artist for the last 2000 years would be on trial for nakedness or having to do with naked bodies. I am a trained art student and nakedness to me is beautiful.

Q Did you run into any problems marketing that album?

A Sir Joseph Lockwood, who was then head of EMI, decided that his company did not want to handle it, only he did not have the guts to tell me to my face, he sent a letter to all his subsidiaries around the world, but he did ask me to autograph the album for him so he could take

it home, and it did enhance my reputation, yes.

Q You previously offered to give me an autograph, and with his Honor's permission would you autograph this album for me at the end of the trial?

A It will be a pleasure. It has made me notorious: it is worth a lot of money on the underground.

Q Isn't it a fact that Capitol also refused to handle this album?

A They were instructed by EMI, as far as I remember.

Q Did you, nevertheless, insist that the album be released to the public?

A I could have sent the picture out without anyone's permission; I did not insist, I said I wanted out, and they did not mind as long as they did not have to handle it.

Q You did arrange for another company, Tetragramaton to put that album out?

A I don't know who came up with Tetragramaton; somebody must have fixed it.

Q But you were interested in getting that album with that cover sold to the public?

A Of course.

Q Do you remember whether there was any adverse

publicity when that album got to the music stores?

A There was publicity and we gave an exclusive of the album cover to Rolling Stone, and both Rolling Stone and myself were very happy with the outcome of the publicity.

Q Didn't many music stores refuse to carry this album because they said it was pornographic?

A I don't remember, probably, but they did that with Beatle albums, too.

THE COURT: When did this come out?

THE WITNESS: '68, I think is when it came out. There was a big flurry, and the music in it was avante-garde, they would not have sold it anyway, and it was just screeches and people talking, and it was an event, rather than a musical happening.

Q Mr. Lennon, I show you a series of trade magazine articles that appeared at the time saying that music stores would not handle this album because it was pornographic?

A Well, that is the opinion.

Q Do you recall reading this articles at the time?

A No, I was in England at the time. I was not in the habit of reading Billboard. I probably read the English papers.

Q Did anybody tell you what was in those articles?

A There were so many articles written about me over the last ten years -- no. There was a big flurry.

Q There was a big flurry about the nude album?

A Yes, and I am glad.

Q Why?

A Because it made people think about their reactions to nudity, including your own.

Q Not my reactions?

A The whole point of the thing was to show that a person like me has nothing to hide, and underneath all the facade and image, I look just like everyone else, and I was well pleased at the effect of this album on the public.

Q Didn't you hear or weren't you told or didn't you read that music stores refused to carry the album because they regarded it as in bad taste?

A I remember it now you are telling me, but that is not what I remember about the event.

Q After you were told that many music stores and record companies and trade journals regarded the album as in bad taste, did you, nevertheless, insist on continuing to distribute it?

A The Americans insisted on putting it in a brown paper bag; the Europeans were not so up-tight about it and let it be released as it stood. So it did go out somewhere.

THE COURT: I am at a loss here, because I assumed that all of this evidence relates to something in the case, aside from being just generally interesting to talk about. I don't know. As far as the issue which I am generally devoting myself to right now, as far as the existence of the contract, I really don't see that we have to get into all this mass of material about articles about the album and so forth.

If it relates to the counterclaim, I am frankly at a loss, because I have not focused on the counterclaims. I am not really completely aware as to what evidence is relevant or not relevant, and I would like to move on. I assure you that I think we are all aware that if we can get the issue decided about the existence of the contract, then, obviously, whatever happens, there are other issues which have to be decided.

MR. SCHURTMAN: One poin t of clarification, will you hear further testimony from Mr. Lennon on the counterclaim and will I be given a further chance?

THE COURT: I will hear further evidence on

any remaining issues after the decision on the contract, whatever it is, and I really don't know what it will be.

MR. SCHURTMAN: My only point is since the issue of good taste had been opened up on direct, I want to know whether I have to complete my cross now.

THE COURT: I don't recall it being opened up. I recall that what was opened up was that Mr. Lennon personally did not approve the Roots cover, and, indeed, was trying to say that it was radically different from the kind of covers that he personally had approved. Now, it is on its face different from the nude album, it is different from Walls and Bridges, it is different from Soul Train.

I don't have to get into the question of whether it is in good taste or not right now.

MR. SCHURTMAN: Let me at this point offer as exhibits the various trade journal articles I referred to.

THE COURT: I would appreciate your holding those. I don't think they are going to help you now.

MR. SCHURTMAN: If it becomes appropriate on the counterclaim I will then renew my offer.

THE COURT: Right.

Q Now, Mr. Lennon, one last question on this and we will leave it:

You started to testify before that the chairman

of EMI, even though he obtained your autograph on the albu said he did not want EMI to handle it?

A He did not say it to my face, but I subsequently found out he had written to a lot of people.

Q Did you have an exclusive contract with EMI at that time?

A Yes.

Q Did you insist that you nevertheless be permitted to release the album through another company?

A I don't remember the details, but they had the right of first refusal. If they don't think it is worth having, they are not going to stop me putting it out. They knew it was not a pop record.

Q Let me show you Plaintiffs' Exhibit 84 -

MR. SCHURTMAN: Incidentally, your Honor, you indicated that you would receive it in evidence, but it has not been marked yet.

THE COURT: What is that?

MR. SCHURTMAN: The Beatle settlement agreement. You had ruled at an earlier point in the trial.

THE COURT: I don't remember, but if you say so.

MR. SCHURTMAN: I so represent to your Honor.

THE COURT: Any objection to this?

MR. PRETTYMAN: I don't know what relevance it

has, but I have no objection.

THE COURT: Received.

(Plaintiffs' Exhibit 84 was received in evidence.)

xx THE COURT: Are there any more questions?

BY MR. SCHURTMAN:

Q Would you look at that agreement.

Is that The Beatles settlement agreement?

A That is what it says on the front. I don't know what it is actually.

Q Let me direct your attention to page 6 --

THE COURT: I wish defense counsel would not hover around the witness.

MR. PRETTYMAN: I am trying to find out what it is. This is not the entire agreement.

THE WITNESS: It can't be.

Q It is part of The Beatles settlement?

A I will take your word on it.

Q Isn't your signature on page 26?

A So?

Q Just say so?

THE COURT: Let us continue.

Q Would you look at page 6, Subparagraph A?

A Yes.

Q Let me read the language to you, and I want to ask you a question about it. It says:

"All individual recordings and all income arriving therefrom shall be treated as included in the partnership business up to the first October, 1974, but shall belong thereafter to the individual Beatle responsible for such activity."

A Yes.

Q What was your understanding of this provision?

A I presume that is the one where instead of all the money being put into one big pot and then coming out to each Beatle, that the money would come direct to the Beatle, each person.

Q Do you know why it was made retroactive to October 1st, 1974?

A That particular day? No, because they kept changing the date they were going to make it retroactive to. I forget the reasons they did it.

Q If, in fact, you had made a date with Mr. Levy on October 8, 1974, would this provision have entitled to keep all your royalties on the album being promoted by Mr. Levy, instead of sharing these royalties with the other Beatles?

A Instead of going into the collective pot, they

would have come straight from the record company to me.

MR. SCHURTMAN: I have no further questions.

THE COURT: Does anybody else have any more questions of Mr. Lennon?

MR. PRETTYMAN: Yes.

REDIRECT EXAMINATION

BY MR. PRETTYMAN:

Q You were asked about the return of the Spector tapes. Who called and told you that the Spector tapes were returned?

A I think it was Al Coury.

Q Were you aware at that time that Mr. Coury had been making efforts to get those tapes back?

A Yes, I asked Al Coury to do anything he could; I asked everybody I knew.

Q Did you give Mr. Edson in advance of that radio interview that you were referring to, any advance information or indication of any kind that you were going to mention the Roots album?

A No. It came up because a listener phoned in and said, "We have seen this album on TV. What is it or whatever?"

And I explained.

Q I take it from that that you yourself had not

planned to do it ahead of time?

A No, I was plugging my album.

Q Did he ask you to say anything for or against Roots album?

A No.

MR. PRETTYMAN: That is all I have.

Thank you.

THE COURT: Thank you, Mr. Lennon.

(Witness excused.)

THE COURT: Can we start with Mr. Seider?

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HAROLD SEIDER, called as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

CROSS EXAMINATION

BY MR. SCHURTMAN:

Q Mr. Seider, did you work with Allen Klein in 1973?

A 1973?

Q Yes.

A No.

Q Were you aware of the fact in 1973 that Mr. Klein was negotiating with Mr. Levy about putting out a Beatles' album on television?

A No.

Q When did you hear about that for the first time?

A I think at this trial.

Q Do you know the distinction between normal retain sales and retail fulfillment centers?

A As used in the business there seems to have developed a difference between the two.

Q What is the difference?

A Well, the Retail fulfillment centers are basically stores like Wolco or K-Mart, which are discount

stores of low priced merchandise, that are not regular department stores as such, and also perhaps some food stores, and basically, those records are put in those stores to be sold as a result of a sort of intensive advertising campaign on a television station in that particular locality. Whereas, the normal retail, which is a term which is now creeping into agreements, refers to the stores that normally or historically have been selling records, for instance, a Mama & Papa store, a Korvettes,would be a regular retail store, at least, in my estimation, stores that stack and have as a regular department a record department.

Q Were you aware of that distinction on October 8, 1974?

A Yes, I was.

Q Was that distinction discussed at the meeting of October 8, 1974?

A No.

Q Let me read to you from page 202 of your deposition, where you were talking about the October 8th meeting. I won't go over everything you said about the meeting, but let me read you at the bottom of page 202:

"And as John -- and we discussed this, the concept of television, maybe that evening or around

that time -- it was that when they were selling it on television and you said mail in your $5 or mail in your $4 or whatever the amount may be, and in the mail comes the album, so that you bypassed those normal retail operations, whether it is retail fulfillment center or a normal retail store."

Does that refresh your recollection that this subject was discussed at the October 8th meeting?

A No.

Can you just read that back to me? I am sorry. And could you read the context in which I said that.

Q Let me read you the whole thing then. I will start at the top of the page:

"Q Now, during the course of the October 8th or the November 18th or 19th meetings, was there any discussion about whether the album would be promoted simultaneously both through normal retail outlets and also through TV promotion?

"A I don't recall that taking place, anything like that taking place at the November 18th meeting. With regard to -- assuming that November 18th is the correct date.

"With regard to the October 8th meeting, other

than John's statement that he -- that because he felt that the album had lost its momentum in so far as Rock and Roll nostalgia and his desire that this not be reviewed or dealt with by the critics as a regular type of John Lennon album comparable to Walls and Bridges, he was looking to bypass that type of distribution operation and go directly to The consumer. I think what John kept emphasizing was the fact that how does he get it from himself into the hands of the consumer without some different intermediary people making a determination of what the consumer is to get. And as John -- and we discussed this, the concept of television, maybe that evening or around that time -- it was that when they were selling it on television and you said mail in your $5 or mail in your $4 or whatever the amount may be, and in the mail comes the album, so that you bypassed those normal retail operations, whether it is retail fulfillment center or a normal retail store."

Does that refresh your recollection that this was discussed not at the November 18th meeting, but at the October 8th meeting?

A No, because if I may explain, Mr. Schurtman,

I may have recalled discussing mail or TV marketing with John, but it was before, because we discussed it before we had gone to the Club Cavallero and when I said about bypassing, how do you get it into the hands of the consumer, the easiest way, of course, is to advertise on television, send your $5, and then here is dealing with the consumer, there is nobody in between to decide whether or not they want to put the records on the stand, the consumer makes the choice directly.

Q So you are telling the Court that when you testified in your deposition that this was discussed at the October 8th meeting, what you really meant was that you had discussed it with John Lennon before the meeting?

MR. BERGEN: Your Honor --

THE COURT: No, that is a perfectly valid question.

A I believe that we discussed it that evening. I don't believe -- I don't have any recollection of the words retail fulfillment at the meeqing at the Club Cavallero.

Q You testified on your direct examination that after you received Plaintiffs' Exhibit 22, which is Mr. Krasilovsky's letter complaining about the breach of the Come Together settlement, you had a telephone conversation

with Mr. Levy?

A I had a conversation with Mr. Levy just before I came to New York on October 7th.

Q Did Mr. Levy complain to you in words or substance that Mr. Lennon was in default under the settlement agreeent?

A No.

Q He says nothing to that effect?

A My recollection of the conversation, I started to explain the Spector problem and he said he wanted to hear it from John Lennon personally, he didn't want to deal with an intermediary. I said I was coming in to New York and I would try to arrange a dinner meeting with him.

Q Did he complain about the fact that there was only one song in the Walls and Bridges album?

A I don't believe that was mentioned.

Q Let me read to you from page 126 of your deposition:

"Q Did Mr. Levy, either in his telephone conversations with you prior to this meeting or at any time during the meeting of October 8, state or use words of similar import that he regarded that John Lennon was in default under the October '73 settlement of the copyright infringement action?

"A Well, 'default' is a nice word. Let's put it this way, that there was only one song on the album. In my discussions with Morris on the telephone --"

And then Mr. Bergen interrupted:

"You are referring to the Walls and Bridges?"

And you said:

"Yes, that one cut -- and he wasn't terribly excited about the one cut that was on it."

Now, does that refresh your recollection that furing the discussion with Mr. Levy, the telephone conversation, he did complain that there was only one cut?

MR. GRUMBACH: Read the next question and answer, please.

THE COURT: Why?

MR. BERGEN: Your Honor --

THE COURT: Mr. Bergen, please don't interrupt. You can use a telephone book to refresh one's recollection.

MR. GRUMBACH: Your Honor, it is --

THE COURT: Please sit down.

A My recollection of that conversation was primarily about getting a meeting with John so that Morris could talk to John.

MR. SCHURTMAN: Your Honor, do you want us to

proceed now? I will into another area.

THE COURT: It is one o'clock, so we will recess until 2.15.

(Luncheon recess.)

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AFTERNOON SESSION

2:00 p.m.

(In open court.)

H A R O L D S E I D E R, resumed.

CROSS EXAMINATION (Continued)

BY MR. SCHURTMAN:

Q Mr. Seider, were phonograph albums sold by direct mail prior to 1969?

A They were sold to record clubs.

Q Was any other form of direct mail other than record clubs?

A I really don't know, Mr. Schurtman. I always understood direct mail to mean record club and I use the two terms interchangeably.

Q Did you hear Mr. Levy's testimony this morning defining a distinction between record clubs and direct mail? Did you hear the testimony, were you here?

A I was here.

Q Do you accept that distinction?

A You would have to read his testimony to me again. I don't recall that specific statement.

Q Let me ask you directly, have you ever heard of the term negative response?

A No.

Q Do you know how a record club operates?

A Yes.

Q How?

A Well,you advertise in magazines generally, for example your Columbia Record Club and get a certain number of records for joining and then you are obligated to purchase a certain number of records and after you buy a certain number of records, you may be entitled to a free record.

Q This method of operation, according to your understanding that the records are sent to the club members and that the club members only accept those records that they want, do you know?

A No, I know how they advertise. I have never joined a record club, so I don't know the exact format in terms of how they deal with the people, other than the fact of ads that I have read in the papers or the magazines, rather.

Q Does United Artists do any business with record clubs?

A Yes, they do.

Q But you're not familiar with the record club operations in detail?

A I'm familiar with the structure of the deal

of a record club, deal between a record manufacturer like United Artists and a record club like Columbia Record Club.

Q It is your testimony, I take it, that prior to 1969 there was no well recognized distinctions between direct mail and record clubs?

A I'm saying to you, my understanding and I use the terms interchangeably was that mail order and record clubs are used synonymously.

Q All right. I believe on your direct testimony you mentioned a Mr. Sidney Shemel, who is he?

A Mr. Shemel is a lawyer who works for United Artists. He is an officer of the publishing companies and he's located in New York City.

Q is he an experienced lawyer in the record field?

A I believe -- Sidney's forte is primarily in publishing, I believe, but he's an experienced lawyer.

Q In the music industry?

A In the music industry.

Q I show you a book, Mr. Seider, the authors of the book are Sidney Shemel and William Krasilovsky and the book is entitled "The Business of Music, A Practical Guide to the Music Industry for Publishers, Writers, Record Companies,

Producers, Artists and Agents."

Have you ever seen this book before?

A Yes, I have.

Q Are you familiar with it?

A I'm familiar with that edition. I'm familiar with the subsequent edition of that book.

Q Is that considered an authoritative treatise in the music industry?

A Mr. Schurtman, I haven't canvassed other lawyers. I know I have a copy which was subscribed by Mr. Shemel to me and I know Mr. Krasilovsky.

Q Do you know of any treatises which deal with the business of music publishing and recording?

A I don't know what you mean by a treatise, Mr. Schurtman. I know there are many books about the music field. There is University of Southern California has a course where they put out bibliographs and contracts. I know Nimmer Copyright, there's Rothenberg on Copyright. I think a fellow by the name of Joseph Taubman has written a book about the music business.

Q All right.

Mr. Seider, this is the first edition copyrighted 1964. I would like to direct your attention to page XVI which contains the following statement:

"Columbia Records entered the record club field in 1955. RCA Victor and Capitol Records began record club operations in 1958. Record club sales have expanded tremendously since 1964 when the volume was in excess of $6 million. It has been estimated that record club and the relatively minor mail order sales in 1963 totalled $100 million."

Does this refresh your recollection that there was a distinction as far back as 1964 between record clubs and mail order sales?

A Mr. Schurtman, my understanding is that the terms -- I use the terms interchangeably. I think if you take a look at the index in the back and you look up mail order, you'll see the reference on that. Look up the reference on the index to mail order and see what they refer mail order to.

Q Let me direct your attention to page 401 which is a form, it is form No. 12 of an agreement between record company and recording artist. I direct your attention to the bottom of that form, the first page, where it says:

"As to records sold by direct mail operations or through record records or similar sales."

Does that refresh your recollection that there was a distinction as far back as 1964?

A Mr. Schurtman, I repeat, I used the term synonymously and interchangeably because if you pick up the balance of that, you will see they speak of "record club operations" and then they speak of "bonus records", those words don't make any context in the mail order as such. Again I refer you, if you take a look at your index in the back when they referred to mail order, see what they refer it to.

Q All right, let's see what they refer it to. They refer youto page xvi --

A I'm sorry. Take a look at the new edition.

Q Mr. Seider, you'll forgive me but I'm conducting this cross examination. I have just done what you have told me to do. I've looked in the index in the back, I've looked under the words mail order and it states "Mail Order, Record Sales, xvi".

I now go back to page xvi, which says "It has been estimated that record club and a relatively minor mail order sales in 1963 totalled $100 million."

A I think if you look at the subsequent edition in the index, if you look at the reference to mail order.

Q All right.

MR. SCHURTMAN: I offer the pages to which I have just referred in evidence.

THE COURT: Any objection? What is it marked?

MR. SCHURTMAN: Plaintiffs' Exhibit 97.

MR. BERGEN: I have no objection.

THE COURT: Do you have an objection.

MR. PRETTYMAN: No, I don't.

MR. BEGEN: I have no objection.

MR. SCHURTMAN: So the record will be clear, I'm offering page xvi. I'm offering page 401. I'm offering page 405, Mr. Seider, look at it, that's a form of master purchase agreement which sets forth the same distinction. I've underlined for you.

A And it also speaks of bonus, free records and record club in quotes.

Q I'm offering page 408 which is entitled "Record Production Agreement" which contains the same distinction. You can verify it if you want to.

Finally I'll ofer the index page which does not nave a number but it is alphabetical and it says "Mail Order" on it.

Q Mr. Seider, you have been referring to bonus records every time I pointed to that distinction, are bonus records made available in regular mail order sales?

A Bonus records are used in connection with record clubs and I told you, Mr. Schurtman, I use the term

record clubs and mail order synonymously. I am not familiar with any other use.

THE COURT: Even as of the present day?

THE WITNESS: That is correct, your Honor. When we draft the agreements, we use the terms interchangeably, at least I use the terms interchangeably.

(Continued on next page.)

THE COURT: What if you had come to drafting an agreement with Mr. Morris Levy, would you have given the right to record club sales?

THE WITNESS: In terms of what, your Honor? I'm not sure I understand the question.

THE COURT: In terms of the way he was going to sell? He wasn't operating record clubs, he was operating a mail order business, wasn't he?

THE WITNESS: No, your Honor. He was marketing through television.

THE COURT: All right. Marketing through television and part of that at least was advertising for mail orders just as a newspaper might advertise for mail orders, right?

THE WITNESS: That's corrrect.

THE COURT: You understood that, didn't you?

THE WITNESS: At what time, your Honor?

THE COURT: In 1964, October and so forth.

THE WITNESS: You mean '74?

THE COURT: '74.

THE WITNESS: I'm getting confused, your Honor. Could you just rephrase your question?

THE COURT: I thought you said a minute ago that you still as of the present day consider record club and

mail order sales synonymous and interchangeable terms, is that what you are telling me?

THE WITNESS: That's correct, your Honor. I used the two terms interchangeably. In the agreements that I draft, your Honor, or that are drafted, we always have in that particular clause, we have the provision for dealing with bonus or free records because the concept of record clubs is that you give a certain number of records for a member joining the club and then after they purchase a certain number of records, they get a free record like the Book-of-the-Month Club for example.

THE COURT: I don't know what kind of agreements you draft but I'm talking about just in general. The thing that surprises me, frankly, Mr. Seider, on this point and I don't want to labor it. We have heard for days and days and days about Mr. Levy's company and K-Tel and other companies that sell via mail orders, that have nothing to do with record clubs.

THE WITNESS: Your Honor, generally when those grants are given out, they are given out for mail order by TV merchandising which has since developed and not in the normal record club. We generally have the phrase "direct mail" or something by television merchandising.

THE COURT: Well, all right. Which means

that as of the present time you certainly recognize that in an appropriate case a contract might refer to mail order sales other than record club sales, right?

THE WITNESS: That's correct. Except again, your Honor, they are used in the context of "by TV merchandising."

Columbia Records could necessarily not put out their records through television.

THE COURT: In other words, if you were drafting a contract with somebody today, and you were conferring on rihts to sell mail order through TV merchandising, you wouldn't say record club, would you?

THE WITNESS: No, we would say direct mail to the consumer through methods of TV merchandising or TV marketing. We would use the words TV because then it might come into conflict with the normal use dealing with record clubs or direct mail.

THE COURT: What do you mean by that?

THE WITNESS: The clauses generally in the contract use the terms mail order or club.

THE COURT: What kind of a contract are you talking about now?

HE WITNESS: I'm talking about a general contract.

THE COURT: A general contract between whom and whom?

THE WITNESS: Well, it could be between -- well, an artist and a record company. It could be between for example a contract between one record company and a record club.

THE COURT: Well, let's take an artist in a record company. How would this problem come up? Allowing the company to distribute through the record club, something like that?

THE WITNESS: That's correct, direct mail.

THE COURT: Now, if it was intended to have -- is this true? Sometimes it confers the right to record club distribution, sometimes the contract doesn't or is it just a boilerplate?

THE WITNESS: No. Very often it could be a very negotiated term, depending on the artist.

THE COURT: If the artist does confer the right to have distributed through record clubs, that would be in the contract?

THE WITNESS: Yes.

THE COURT: What kind of language would they use?

THE WITNESS: They would generally use the

language, we use the phrase "direct mail order" or "through club operation", "direct mail to the consumer". Then we go into language about the amount of bonus records that could be given out. Very often sophisticated lawyers on the opposite side would have some provision limiting the amount of free records that could be given out.

THE COURT: I'm just asking you, if you today were involved in drafting a contract between an artist an d a record company, and you intended to confer the right to distribute to record clubs, would you have language in there that included the specific words "record club"?

THE WITNESS: That's correct.

THE COURT: You wouldn't just put in mail order without the worda "record club", would you?

THE WITNESS: It really depends, your Honor. I know that we at United Artists --

THE COURT: It depends on what?

THE WITNESS: It depends on the companies you deal with. It depends on the companies in the form of agreement that they use.

THE COURT: What does it depend on, whether you would want to limit it to record clubs or want it to be more general?

THE WITNESS: They use a broad term. They

will use a word mail order direct to consumer and record clubs.

THE COURT: If that phrase is used, what rights are they conferred to the record company?

THE WITNESS: The right to record club or to have direct mail to the consumer.

THE COURT: When you say the "or", right to have direct mail to a consumer, are you telling me that is the right to do it by direct mail to the consumer without the record club?

THE WITNESS: There may not be a club as such.

THE COURT: Now, let's go back. Maybe you will come to this but as long as it is coming, I want to see about it.

Did you say before that you had, that you assisted in the drafting of that 1969 Apple-Capitol agreement?

THE WITNESS: That's correct, your Honor.

THE COURT: Did you assist in the drafting of that particular Article 3?

THE WITNESS: The entire agreement, your Hono.

THE COURT: Whatever it is?

THE WITNESS: The entire agreement.

THE COURT: I know I'm repeating.

Did you have to do with the drafting of that phrase and what you focused on, the mail order right exception or exclusion, do you remember that?

THE WITNESS: Yes, I'm familiar with that. That was the entire agreement. I was involved on the part of Apple in drafting that whole agreement.

THE COURT: We focused on this Article 3, Section 1 and that exclusion that uses the wording, the distribution of mail direct to consumer, do you recall that?

THE WITNESS: That's correct.

THE COURT: Can you tell me why -- let me ask you this:

Is it your testimony that you did not understand that to be any broader than record club and that it related solely and was limited to record clubs?

THE WITNESS: That's correct, your Honor. If I may explain?

THE COURT: Okay. You can tell me why you used the more general wording then.

THE WITNESS: It was used I believe by the Capitol lawyer and we accepted that definition or that particular terminology.

THE COURT: Who is the Capitol lawyer?

THE WITNESS: I believe Mr. Payson Wolf was the draftsman or the principal draftsman on the part of Capitol. But the reason for the way that particular clause was drafted was because if you go back to the 1967 EMI-Beatle agreement, recording agreement, there was a provision stating that in North America, EMI licensees in effect could not put out any deal recordings through a club operation or record club -- I forget the exact terminology -- if the manager or the artist objected to that form of exploitation. So what we did in order to carry that through because Article 3 was intended to give a blanket grant to Capitol with regard to the exploitation of Beatle recordings in the United States, except with certain reservations or restrictions.

That particular clause was to cover the club operation. That's how I understood it at the time and that's how I still understand it.

THE COURT: Just from my questioning of you, let me just arrive at a nomenclature. Just so I can question you. I'll use the word "mail order rights". If I mean mail order -- no, I'm sorry.

I'll use club rights or club distribution if I mean nothing more than club distribution literally, okay. I'll use mail order rights -- wait a minute.

I'll use mail order rights other than club rights, those two terms, right?

THE WITNESS: Right.

THE COURT: Do we understand each other? Now, what was the name of the Capitol lawyer?

THE WITNESS: Mr. Payson Wolf, W-o-l-f.

(Continued on next page.)

THE COURT: Now, I understand that in drafting an agreement, as in drafting a statute or whatever, everything need not be thought of; sometimes there are a lot of things not thought of, right?

THE WITNESS: By hindsight --

THE COURT: All right. I am not suggesting that you should have or did think of every topic, but I want to ask you, Mr. Seider, was there any discussion between you and -- was it Mr. Wolf?

THE WITNESS: That's correct.

THE COURT: Was there any discussion between you and Mr. Wolf specifically relating to mail order rights other than club rights?

THE WITNESS: I don't recall, your Honor. This is 1969. This was over -- we began the drafting on a Monday and I believe we ended up on Thursday, or early Friday morning, some time about 3 or 4 o'clock in the morning. So I just don't remember. I mean, I don't remember any specific conversations as such.

THE COURT: Let me ask you this:

As far as your own consideration, aside from discussions, would yu be able to tell me whether you considered or focused on in your mind anything about mail order rights other than club rights?

THE WITNESS: No. Because I -- in my mind, your Honor, I identified that phrase to mean the club rights, and it was carrying through the provision that we had -- or the provision or the topic that we had discussed with Capitol back in August of 1969.

THE COURT: Let me see, are you telling me that as far as your understanding was concerned, you were agreeing, or Apple was agreeing to convey to Capitol everything except what was expressly reserved in these exclusions; right?

THE WITNESS: Reserved or restricted, your Honor.

THE COURT: All right. And as far as what that everything consisted of, you didn't specifically focus on mail order rights other than club rights?

THE WITNESS: That's correct.

THE COURT: All right. That as far as your understanding was concerned, the only thing that was specifically reserved, according to your way of thinking -- in this particular clause -- was the mail order rights, is that what you are saying?

THE WITNESS: I didn't look upon it as a reservation, your Honor. I looked upon it as a restriction.

THE COURT: I am not worrying about that.

A restriction -- let me make sure I understand -- as far as your own way of thinking was concerning as to this particular clause, you understood that Apple was giving away everything except reserving the mail order rights -- I'm sorry, the club rights?

THE WITNESS: Again, I don't mean to quibble with you, your Honor, they were -- Apple was granting over to Capitol all the rights that had been given to it, but there was a restriction with regard to club rights so that --

THE COURT: I think I used the wrong word.

You are objecting to "restriction"?

THE WITNESS: It is a restriction and not a reservation.

THE COURT: All right. I think I understand you.

So you agree with my last statement with the amendation of reservation for restriction?

THE WITNESS: Because in effect it was a restriction because in that way Capitol could not unilaterally, without the consent of Apple or the manager or the individual Beatles, grant club rights.

THE COURT: You were participating in these

discussions on behalf of whom?

THE WITNESS: I was employed by Abkco, who was at that time representing the Apple operation.

THE COURT: So you were participating on behalf of Apple?

THE WITNESS: That's correct, your Honor.

THE COURT: And are you telling me that on behalf of Apple you did not intend to reserve to Apple or restrict for Apple mail order rights other than club rights?

THE WITNESS: That's correct, your Honor.

THE COURT: Was anybody --

THE WITNESS: May I add this, your Honor?

THE COURT: Yes.

THE WITNESS: You've got to understand, this agreement was drafted and initialed, or partially executed prior to going to EMI, so there wasn't even any underlying license to grant the rights. That came subsequent.

THE COURT: I want to ask you this:

Was anybody else representing Apple in the drafting of this document?

THE WITNESS: I was the only one who was a lawyer. Mr. Klein was present at various times. Mr. Silver, who is not a lawyer, was present at various

times --

THE COURT: I seem to have lost you.

Who was present at various times?

THE WITNESS: Mr. Klein and Mr. Slver.

THE COURT: All on behalf of Apple?

THE WITNESS: They were employees of Abkco, who at that time was managing the Apple group of companies.

THE COURT: So in this regard they were --

THE WITNESS: They were not lawyers, your Honor. And they were not involved in the drafting as --

THE COURT: So you were the main draftsman on behalf of Apple?

THE WITNESS: That's correct, your Honor.

THE COURT: Did you ever explain to Mr. Klein or Mr. Silver -- did you ever discuss with either of those men, or both of them, what we are talking about just now; do you recall?

THE WITNESS: I don't recall. As I said, your Honor, it was a four-day period back in 1969 and I just don't recall. I just have no recollection of discussing that specific phrase with them.

THE COURT: The agreement was signed on behalf of Apple by Mr. Lennon, right?

THE WITNESS: That's correct, your Honor. But not at that time. That was signed subsequently.

THE COURT: Whenever it was. But I want to ask you if you ever discussed with Mr. Lennon in connection with the creation of the contract -- did you ever discuss with him at about that time the subjects we have just been talking about in the last few minutes?

THE WITNESS: No, your Honor.

THE COURT: Did you ever discuss such subjects with anybody else at Apple or any of the other Beatle -- in other words, did you discuss with your principal the subjects we have been discussing in the last few minutes?

THE WITNESS: No, your Honor.

THE COURT: All right.

You may proceed, Mr. Schurtman.

BY MR. SCHURTMAN:

Q Let me clarify one point, Mr. Seider, and I will use the exact language in Exhibit C-2, Article 3, Section 1, Subdivision 2-I. You use the words:

"The distribution by mail direct to consumers."

Do I understand you to say that means the same thing as the record clubs referred to in Article 4, Section 7?

A May I just see the agreement?

MR. BERGEN: Show him the agreement, please.

MR. SCHURTMAN: Of course.

Q That is what his Honor just asked you.

Look at it again.

THE WITNESS: May I have the question.

(Question read.)

THE WITNESS: Yes.

Q And you never draw any distinction between the two?

THE COURT: Wait a minute. We are really retreading.

He never to this day draws any distinction. We have been through that. He has said that obviously today there are distinctions which he draws. Then in my questioning I went back and I think I was covering fairly thoroughly his role and so forth at the time of this agreement.

In your questioning you better be clear whether you are talking about his views today or his intentions and understandings and so forth back at the time.

MR. SCHURTMAN: I fully agree, your Honor.

Q Let me focus on October 8, 1974.

As of that time did you draw a distinction in your mind between direct mail and club rights?

A At the meeting on October 8th?

Q No, as of that time, was your understanding that there was a distinction?

A I'm not sure, Mr. Schurtman. I really am not sure. It is very difficult for me to go back to October 8th and say that on that date I say there was a distinction.

Q Let me try and help you.

I show you an agreement dated April 9, 1973 entitled Master License.

It is addressed to United Artist Records, Los Angeles, California. I direct your attention to certain things. I direct your attention to Paragraph 2, Subdivision 2-I, which contains the following language:

"Through direct mail and/or mail order in accordance with merchandising methods known and understood in the mail order business as 'subscriptions' or 'club plan' methods."

Does that refresh your recollection -- just look at the first page, Mr. Seider -- does it refresh your recollection that there was a distinction prior to October 8, 1974?

I see you are looking at the back page. Your signature appears on the back, Mr. Seider.

A What was the question again?

Q Does it refresh your recollection that prior to October 8, 1974, or as of October 8, 1974 it was your understanding that there was a distinction between direct mail and club rights?

A It doesn't refresh my recollection, Mr. Schurtman.

Q Did you sign this agreement, Mr. Seider?

A That is my signature.

MR. SCHURTMAN: I offer the agreement in evidence.

THE WITNESS: May I explain why I signed that?

THE COURT: Is it marked for identification?

MR. SCHURTMAN: It has not been yet.

(Plaintiffs' Exhibit 98 was marked for identification.)

xx MR. PRETTYMAN: May I see it?

MR. SCHURTMAN: Yes.

THE COURT: What is that document, is it an agreement of a certain date?

MR. SCHURTMAN: It is a master license agreement dated April 9, 1973. It is in the form of a letter agreement addressed to United Artist Record, Inc. in Los Angeles. It is signed Sue Ellen Productions, Inc.,

and it states:

"That it is agreed to and accepted on behalf of United Artist Records, Inc., by Harold Seider, vice-president."

THE COURT: All right. That is being offered. Is there an objection?

MR. PRETTYMAN: Can we take a look at it, your Honor?

THE COURT: Yes, surely.

MR. PRETTYMAN: No objection, your Honor.

MR. BERGEN: No objection, your Honor.

THE COURT: All right. Received.

(Plaintiffs' Exhibit 98 was received in evidence.)

xx MR. GRUMBACH: Can we clarify that this document was turned over to us as apparently something in the files of Adam VIII?

As long as the document is going in, can we just get who Sue Ellen is and how it came in Adam VIII's file.

THE COURT: You can ask that. Let's let Mr. Schurtman finish.

Go ahead, Mr. Schurtman.

Q Before we leave Plaintiffs' Exhibit 98, I know that in paragraph 1 -- I am sorry, paragraph 2, subdivision (B)(1)(i) reference is made to special subscription in retail fulfillment centers in conjunction with specific advertisements on radio and television. I assume that confirms that you knew where the retail fulfillment center was prior to October, 1974?

A I think I said I did.

Q All right.

THE COURT: This has slipped my mind. Do you think that it is necessary for me to hear the records in question or any of these tapes before making my findings on the question of whethere there was or was not a contract? Those things have been introduced into evidence but I have not heard them.

MR. SCHURTMAN: Your Honor, I had planned to ask you to give us approximately 10 or 15 minutes to play the records and to play the TV commercial for you.

THE COURT: Have you got equipment down here?

MR. SCHURTMAN: I do.

THE COURT: Can I just interrupt you for a

moment. We have certain things in evidence, recordings and tapes. I am trying to figure out how much of that I need to hear, if any, before I reach my conclusion on the question that I am trying to make findings on.

We have got the tape of the Spector, the so-called Spector tapes, we have got the 7-1/2 tape that was given to Mr. Levy, we have got the final Roots album, we have got the final Capitol album and how much of that do I need to hear?

MR. SCHURTMAN: Your Honor, do you want Mr. Prettyman to reply?

THE COURT: No. Mr. Schurtman, you may reply.

MR. PRETTYMAN: Our position would be that you don't have to hear any of it for the present problem, but if you are going to hear certain things we'll ask you to hear certain other things in conjunction with.

THE COURT: What do you say, Mr. Schurtman?

MR. SCHURTMAN: All I want to play for you is the Roots album and I think if you listen to that five or ten minutes that should be enough for our purposes.

THE COURT: On equipment here?

MR. SCHURTMAN: Right here, yes.

THE COURT: Mr. Prettyman.

MR. PRETTYMAN: So long as you are not

listening to the tonal quality, rather your are listening to the content of it,then we would ask that you hear that in conjunction with the rock and roll album so that you can see what is missing, some changes and so forth.

THE COURT: All right. You don't -- the equipment here is all right, right?

MR. PRETTYMAN: You are not making a concert technical judgment.

THE COURT: I don't think it would hlep me to do that.

MR. PRETTYMAN: Fine, your Honor.

THE COURT: Keep that in mind and some time today or tomorrow please bring it up.

MR. GRUMBACH: I would like to suggest to Mr. Schurtman that he stipulate that in the recording of the Roots album there were changes made of the kind called EQing by the engineeer who cut the lacquer master and in the presence of a Roulette employee, and therefore that what was put on the lacquer master was not precisely what was on the tape. I'd also like a stipulation that one of the songs on the rock and roll album is in fact different because of the so-called Spector edit.

THE COURT: I think we can get that through the hearing -- Mr. Lennon can tell me, if need be, where the

bsbr 4 Seider-cross

so-called Spector edit is. That last one I think we can get from hearing it in conjunction with Mr. Lennon's testimony.

As far as what Mr. Levy or a Roulette engineer did, that is something else again. Are you willing to stipulate that?

MR. PRETTYMAN: We have a deposition on that.

MR. GRUMBACH: We have a deposition which is very short.

MR. SCHURTMAN: We will stipulate that in the final preparation of the lacquer a certain amount of EQing was done.

THE COURT: That will work out. The only thing we need to do -- I just wanted to know whether I had to plan on going uptown or where we would play it here.

MR.SCHURTMAN: Fine.

THE COURT: Go ahead with Mr. Seider.

MR. PRETTYMAN: As long as you are going to listen to that, the commercials are awfully short, we may as well play those too.

THE COURT: You have equipment here.

MR. PRETTYMAN: Yes.

MR. SCHURTMAN: It is on its way.

THE COURT: All right.

BY MR. SCHURTMAN:

Q Mr. Seider, directing your attention to your telephone conversations with Mr. Levy which preceded the October 8, 1974 meeting, and the October 8, 1974 meeting itself, did Mr. Levy tell you that he was going to sue John Lennon for non-performance of the 1973 settlement agreement?

A No.

Q Let me read to you from page 127.

THE COURT: Your question was directed to what date, please.

(Question read.)

Q Let me read to you from page 127 of your deposition:

"Q Did Mr. Levy, either in that telephone conversation or in conversations prior to October 8th, or in the meeting of October 8th, indicate to you or to anyone present at the meeting that he was going to sue John Lennon for non-performance of the October '73 settlement?

"A I think he may have started off the conversation by saying that he didn't want to sue, but after that we went into the discussion of what had taken place."

Now, when did he say that he didn't want to sue, was that at the October 8th meetint itself?

A I don't recall that being said at the October 8th

meeting.

Q Was it said in the telephone conversation?

A I really don't recall, Mr. Schurtman.

Q Very briefly, isn't it true that at the October 8th meeting Mr. Lennon told Mr. Levy that he was disgusted with the Spector album and that he had lost all desire and lost interest in completing the album?

A Mr. Lennon said that?

Q Yes.

A I don't believe he said that.

Q I refer you to page 116 of your testimony on the deposition taken on June 27, 1975.. I won't read the whole thing, I will read part of it, starting at line 9:

"And that those nine masters, that six were salvageable at best and that the cost that Capitol had laid out, or had reimbursed to Spector or Warner Brothers, who had laid out the money, approximately $90,000 to recover these tapes. We then -- then John started to go into a discussion of his attempts, having now finished the Walls and Bridges album, to salvage those tapes and he indicated again the fact that only six of the tapes were at best salvageable and that he was, you might say, disgusted with the project, that he had lost all desire. He thought that

the timing was all off, the delay created by the Spector difficulty made an album such as this inappropriate to complete. He felt that they weren't of top caliber as they were presently constituted. He mentioned the fact of what to do with the tapes, because he was always, as an artist he doesn't like his product, his work product to lie in the can. He isn't a closet artist, he is an artist who wants to get out and he discussed possible, initially he discussed various approached to this. He had lost the interest in completing the album."

Does that refresh your recollection that Mr. Lennon said this in words or substance to Mr. Levy?

A No, I think I said "You might say" or "You might mean the following" I know that John didn't lose interest, he didn't say that he had lost interest. Maybe at that partiuclar moment he was just tired of working on those tapes. He had been working, Mr. Schurtman, if I recall, I believe Since August of '73, and he had been in the studio or recording since August of '73, and it was now October of 1974.

Q Mr. Seider, are you repeating what you heard Mr. Lennon say on the stand this morning?

A No, I am not, Mr. Schurtman.

Q That is not what you said in your deposition,

is it?

MR. GRUMBACH: Is that a question, Mr. Schurtman?

THE COURT: Are you saying, Mr. Seider, that there was some -- "I haven't gotten the complete context of the deposition or something", what are you saying?

THE WITNESS: I think it is not truly reflective of John's state of mind or my understanding of John's state of mind at that particular time.

THE COURT: Wait a minute. The question to you was what did Mr. Lennon say at the meeting. It may be another question whether that really reflected his state of mind or not.

But let us separate the two.

THE WITNESS: Again, he --

THE COURT: What do you remember him saying at the meeting?

THE WITNESS: That he was -- let's take the part about the salvaging. That of the nine Spector tapes he had felt that about six of them could be salvaged; that the other three, there is nothing that could be done with respect to them.

He also had said that he had been trying

to think of what he could do to get those records out, because he hates to keep material in the can.

One of the proposals he had thought about was this EP, extended play, record. I remember both Morris and I said that that type of record does not sell in the United States. He also said that he had been speaking to the people at Record Plant, I believe, and bouncing off them if they thought this might be good for television. He had indicated that the entire Spector recording episode was a kind of nightmare to him, and he had indicated a kind of disgust or disturbance with everything that had taken place but I am sorry if I gave the impression, Mr. Schurtman, that John didn't want to do anything more in connection --

THE COURT: No, let's stick to this now.

THE WITNESS: Sorry. Okay.

THE COURT: But did Mr. Lennon say at that time -- again I want you to be very careful to give me your memory of what was said and not your memory of his state of mind -- I am interested in what he said.

THE WITNESS: Yes.

THE COURT: Do you remember him saying anything about his own -- let me start again -- the emphasis on the word "said" do you remember that he said anything at that

evening about his state of mind, namely, him being disgusted, his interest or lack of interest, and so forth; do you understand my question?

THE WITNESS: Yes. I don't believe he said he had lost the interest to the point where he wouldn't do anything to complete it.

THE COURT: Did he say anything about losing interest at all?

THE WITNESS: No. He indicated the fact that he wasn't sure if this would be the appropriate time, or this type of album would be appropriate.

THE COURT: Just to confirm it.:

Did he say anything about having lost the interest or being disgusted -- lost the interest is what I want to focus on.

THE WITNESS: No, not in completing the album, your Honor.

THE COURT: All right. You can pick that up, Mr. Schurtman.

BY MR. SCHURTMAN:

Q Did the discusison of a television promotion come up when Mr. Lennon said that he wanted to find some way of bypassing the critics?

A I don't believe one followed from the other

immediately. I believe Mr. Lennon did say that he felt that the critics -- this album had achieve a certain amount of not ety -- this is the Spector -- and he would like to be able to bypass the critics.

The television aspect came when he was indicating the various avenues that he had been exploring to release the records vis-a-vis the singles, the maxi single or perhaps going on television. And that's when Mr. Levy said, "I put things out on television."

Q Was there any discussion that for an artist like Mr. Lennon to record old rock and roll songs and then sell the album over television would be a first in the industry?

A Oh, yes, that -- words like that were mentioned.

Q As a matter of fact, didn't Mr. Lennon say so, that he --

A I honestly don't know who said that. I know that the concept of the first, or words like that, were used.

Q Let's see if we can pin down who said it.

At page 123 of your deposition you testified, and I quote, from line 21:

"A I think Lennon used words to the effect that

he liked television very much, and he thought it was an important medium: that he thought that marketing an album which was not a repackaging would be a good idea. It would be a first, and that it would also, because of the nature of the content of an oldies type of album, it would be a way of bypassing the normal distribution pattern and the reviewers and going direct to the consumer."

Did you hear Mr. Lennon say that in words or substance, all of that?

A If you are reading my testimony then I guess I did.

Q No, I'm not asking whether you said it in your deposition, I know you did.

Did you hear Mr. Lennon say it on October 8th?

A At this moment, I don't recall whether he said those exact words.

Q At the time of the October 8th, 1974 meeting, Mr. Seider, I take it you were aware of the fact that Mr. Levy's companies were engaged in TV album promotions?

A Well, Mr. Levy has a lot of things. I knew that he had a company in tha- area.

Q Did you know that he had a company known as Adam VIII?

A That is correct.

Q Did you know that Mr. Levy's company, Adam VIII, handled TV mail order sales?

A I know they are involved in TV marketing.

Q Okay. Incidentally, at this October 8th meeting, did Mr. Bernard Brown make any contribution to the discussion?

A Well, the discussion as to what? You'll have to be more specific, Mr. Schurtman.

Q To the substance of the television package that was being discussed at that point?

A Again I'm a little confused. If you can tell

me what you mean by the substance of the television package.

THE COURT: What do you have in mind that he said, anything?

THE WITNESS: I don't recall Bernard saying anything about the television package as such. I just don't recall, your Honor.

Q Would it be fair to say he didn't contribute anything to the discussion?

A Bernard spoke. I don't recall what he said. He may have mentioned -- songs I know were being bandied about at one point in that conversation and whether Bernard said, "Yes, I know that song" or he may have contributed a song, I just don't know, Mr. Schurtman.

Q But you don't remember Mr. Brown discussing any aspects of television merchandising or anything of that sort?

A Perhaps he volunteered that he had seen television ads but I just don't recall now, Mr. Schurtman.

Q Now, during the latter part of the October 8th meeting, after the idea of a TV promotion had been discussed, did everyone become very enthused about it?

A Well, we thought that a television marketing might be a novel idea.

Q I'm going beyond that, Mr. Seider. I know you

discussed it as a novel idea, you said that before.

But did people become enthusiastic and excited?

A I know Mr. Levy did. He kept talking about the numbers of sales could be gotten, five, seven million, how it enhanced the career of Chubby Checker. What a great idea it would be.

Q Let me read to you from page 120 of your deposition:

"And the discussion continued with regard to the various titles and what a great idea it was, et cetera, you know, basically in that vein, great idea and discussing titles and getting everybody enthused."

Does that refresh your recollection that you and Mr. Lennor were also enthused and it wasn't just Mr. Levy?

A Mr. Lennon was just going through -- they were ticking off, you might say, songs and remembering favorite rock and rolls. It's like if you and I sat down and discussed baseball and we would get enthused.

Q You wouldn't find me very enthused.

A Well, I might get enthused then.

Q Did Mr. Levy and Mr. Lennon discuss the number of songs that should be put on the album for television pro-

motion?

A There was a discussion -- Morris had spoken about usually television packages have about 20 cuts in them.

I remember John said something to the effect that it would affect the quality if he had 20 cuts because of the amount of time on each side.

Q That's all you recall?

A I think we discussed about maybe -- I don't know who brought up the 15 or 16 or something like that. Some number in that area of the number of songs, the most number of songs that could be gotten on the record without distorting the quality of that record.

Q Well, didn't Mr. Levy in fact suggest 15 or 20 titles and Mr. Lennon had first said 10? And then finally they discussed 15 or 16?

A I'm not sure that it came out that way, Mr. Schurtman. I know that Levy spoke about the fact that on these records you have about 20 or 21, whatever it may be number of sides on these TV packages and John had indicated that it would affect the quality.

Q Let me read to you from your deposition, page 140.

"Q Do you recall whether there was any further discussion at this October 8th meeting that you have not yet

told us about?

"A I seem to -- when you started talking about the titles, I seem to remember a discussion insofar as I said before a number of titles. Levy thought that a good package ought to have about 15 to 20 titles and I seem to recall John indicating that a good recording -- because John was always concerned with the quality of his recordings -- would have a limited, would have a playing time of X number of minutes, maybe 20, 22 or something like that. It would be difficult to get on each side of the album, ten sides, without comparing the quality of the sound of the album. So that I think John felt that any television or recording could not have more than 15 titles to it, maybe 15 or 16. That the length of the productions would have to be limited to get even that many" --

MR. GRUMBACH: I think he omitted one word.

He said, "So that I think John felt that any television or any recording could not have more than 15 titles."

MR. PRETTYMAN: Which is completely consistent with the man's testimony, your Honor.

THE COURT: I would think so, correct.

Q Now, was it at least in contemplation of that October 8th meeting that Mr. Levy would make this TV package with Mr. Lennon?

A We had discussed a possibility subject to getting -- working out whatever terms had to be worked out and subject primarily to getting the permission of EMI and that was made emphatically clear to Mr. Levy that evening.

Q Was there any discussion about terms?

A That night?

Q Yes.

A No.

Q Did anyone raise the question how much are these albums sold for on television?

A Well, when we got into the discussion of --

THE COURT: Can I interrupt you.

I asked You this once before and I still don't

understand it, Mr. Seider. I don't understand why there was the reference to the consent of EMI, Len Wood of EMI, and so forth in that discussion and all through those subsequent discussions that you mentioned.

The problem is this, as I understand it, your idea of the contract was that Capitol owned the mail order non-club rights to John Lennon's recordings as well as retail rights and so forth, right?

THE WITNESS: Again, I don't mean to quibble with you, your Honor. Capital didn't own the rights.

THE COURT: Please, that isn't the point. I'm not trying to differentiate "owning" from some other word.

But am I basically right?

THE WITNESS: That Capitol had the exclusive distribution of all Beatle products in the United States.

THE COURT: That was your understanding at the time?

THE WITNESS: That's correct.

THE COURT: Now, how could, according to your understanding, how could Mr. Lennon license or whatever the proper word is, or give to Mr. Levy any distribution rights for a new record without getting Capitol's consent?

THE WITNESS: Because I think I may have said and the reason I said with respect to EMI that evening was that you have got to go to the owner of all the rights. Everybody else is a licensee. EMI owns those rights lock, stock and barrel. So therefore any use of those rights which deviates from any existing license would perhaps have to be gotten from EMI.

THE COURT: You're relying on the language in the EMI agreement that requires their permission?

THE WITNESS: That's correct. Everybody starts from --

THE COURT: All right.

Let's assume that you had to get the consent of EMI, did you not, according to your view of the setup, did you not have to also get the consent of Capitol?

THE WITNESS: After you got EMI's consent, you would then have to go to Capitol and ask Capitol if they would also consent to it. But if EMI said no, then Capital couldn't even say yes.

THE COURT: You saw no reason to -- in these many talks about getting somebody's consent, you saw no reason to even mention the need to get Capitol's consent?

Maybe I'm not paraphrasing your testimony

right.

THE WITNESS: Again, the point was that you have got to go to the source of the ownership and you've got to start with EMI. Why start with Capital if you have to turn around and Capitol has to check with EMI? You might as well go to EMI first.

THE COURT: But you knew you had to go to Capitol second, right?

THE WITNESS: That's correct.

THE COURT: Did you ever tell Mr. Levy you have to go to Capitol second?

THE WITNESS: We never got to that point. I said we have got to go and first get the permission of EMI. Somewheres down the road, I informed Mr. Levy I had spoken to Rupert Perry, and I was informed that if it involved marketing in the United States, go to Capitol.

THE COURT: You were going to Capitol rather as a delegee for EMI, somebody who could deal for EMI?

THE WITNESS: You have to think of it in the sequential sense. You first go to EMI who owns the rights. Then go to Capitol -- we may give it to you for the world outside the United States and Capitol would have said no. But EMI said we don't give it to you, the permission for the world or the United States.

THE COURT: Let me ask you it this way:

You are aware of the permission of Mr. Levy that the only reservation you made in your discussions with him was foreign rights and possibly retail fulfillment rights in the United States?

THE WITNESS: I heard that testimony, your Honor.

THE COURT: Now, are you sure that you -- the reason you didn't keep referring to EMI wasn't that -- let me put it this way:

Are you sure that the reason you kept referring to EMI was not that it was foreign rights which you were mainly concerned about --

THE WITNESS: No. They owned the rights exclusively throughout the world. They had the rights under the Apple-EMI license to pull that license at will without any breach on their part, without any damages bu Apple against EMI. You've got to go to the only --

THE COURT: You mean the Apple --

THE WITNESS: Apple-EMI license could have been revoked at will.

THE COURT: I'll take a short recess.

(Recess.)

MR. SCHURTMAN: Excuse me, your Honor, may I ask to what time we will sit today?

THE COURT: I am going to sit as close to 4.30 as I can.

MR. SCHURTMAN: May I make an application then?

THE COURT: Yes.

MR. SCHURTMAN: Mr. Norman Sheresky is in the courtroom . I believe he will be a short witness.

THE COURT: I don't object to that.

MR. PRETTYMAN: Your Honor, I thought we agreed this morning that we will try to go right through.

MR. SCHURTMAN: I need more than a half hour, your Honor.

THE COURT: Let's have Mr. Sheresky.

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N O R M A N S H E R E S K Y , called as a witness, first having been duly sworn by the Courrt, stated his address as 14 East 77th Street, New York, N. Y., testified as follows:

DIRECT EXAMINATION

BY MR. SCHURTMAN:

Q Mr. Sheresky, what is your occupation?

A I am an attorney.

Q Are you a member of the New York Bar?

A Yes, I am.

Q Are you admitted to the Southern District of New York?

A Yes, I am.

Q When were you admitted to the New York Bar?

A In 1953.

Q Do you specialize in any particular types of legal work?

A Well, I suppose in matrimonial work.

Q Do you know Morris Levy?

A Yes.

Q How long have you known Mr. Levy?

A Perhaps five years, six years.

Q How did you first happen to meet Mr. Levy?

A I met him socially. I owned a house in Chatham, New York, which is near Mr. Levy's home in Ghent, New York.

Q Have you visited Mr. Levy's farm?

A Yes, on many occasions.

Q Did you subsequently, after getting to know Mr. Levy socially, also do legal work for him?

A Yes. Well, I subsequently represented Mr. Levy in connection with a matrimonial case which he has had for some time.

Q All right.

Let me direct your attention to a certain weekend in October, 1974, a weekend when Mr. John Lennon and a group of musicians were up at Mr. Levy's farm.

Were you at the farm that weekend?

A Yes, I was.

Q Were you accompanied by anyone?

A I was with my daughter.

Q Did your daughter bring a friend with her?

A No, she did not bring a friend. She had a friend who was in Ghent, New York and who spent part of the weekend with her.

Q Is the friend's name Lucy.

A That's correct, Lucy Powell.

Q From North Chatham. New York?

A That's correct.

Q What is your daughter's name, by the way?

A Her name is Brooke, B-r-o-o-k-e.

Q When did you get to the farm that weekend?

A I believe it was Friday evening during the dinner hour. So I would imagine it was some time around 8 o'clock, though I'm not sure.

Q All right.

Do you recall who was at the farm that weekend?

A Well, besides myself and my daughter, Mr. Levy, May Pang, I believe, several musicians whose names I no longer recall, Mr. Lennon, and perhaps two or three other people; I just don't recall.

Q Can you tell us briefly your best recollection of what was going on at the farm that weekend?

A Well, I would suppose that the -- what was going on was that Mr. Lennon and the musicians were rehearsing all through that weekend for a record that was being done by Mr. Lennon for or with Mr. Levy.

Q How do you know the record was being done by Mr. Lennon for or with Mr. Levy?

A Well, that was -- all of the conversation that took place during that weekend centered and focused upon that event.

MR. PRETTYMAN: I object, your Honor, unless we get specifics.

THE COURT: Yes.

MR. SCHURTMAN: I will get specific.

Q Can you remember specifically who said what to whom?

A Well, there were so many different occurrences; for example, on Friday evening I recall a lot of conversation about the recording, but I really do not recall any

specific conversation at all. I have a recollection that there was some rehearsing done later that evening, or playing of songs in the far living room. I don't remember specific conversations taking place that evening.

During the next day there were quite a few conversations. Miss Pang was working at a typewriter during the afternoon and she was typing various things and I asked her what she was doing and she told me that she was doing something in connection with a recording that was going to be made by Mr. Lennon for Mr. Levy, I believe, the following Monday or Tuesday.

I asked her what it was. She told me what it was. I cannot tell you, Mr. Schurtman, what she told me she was doing, I don't recall.

Q Do you remember any other specific conversations?

A Then of course there was a good deal of conversation about whether or not my daughter and myself and her friend Lucy could watch the rehearsals that were going on. We were quiet; we were told to be quiet.

Another time I asked May whether or not we could watch and she said sure and she brought us over to watch the rehearsals going on.

During dinner of that evening the conversation again centered upon the recording that was going to be

made. I'm sorry, Mr. Schurtman, I do not recall the content of that conversation, except that the conversation was mostly about the recording. I do not know specifically what was said.

That evening in the living room, that Saturday, I remember two pieces of conversation dealing with the recording. One of them was when Morris was talking to John Lennon about how much money they were going to make from the recording, and there was a lot of laughter concerning how much -- a lot of money was going to be made, so much money that I did not know whether they were being serious or whether they were clowning. Certainly they were laughing a lot about it.

That evening, too, which was Saturday evening, the television set was on and there were some commercials being run, television commercials dealing with buying records or cassettes, local television commercials being done and John and Morris were talking and explaining to somebody, I do not remember who, that this is the kind of promotion that was being done for their recording.

There were other conversations with the musicians about the kinds of songs that were going to go into the album.

There was a conversation between me and Miss

Pang as to where the recording was being made and whether or not I could go see it. That's about all I can recall.

Q Did you have any conversations about any other subjects with Mr. Lennon?

A About what?

Q About any other subjects?

A We talked about my book.

Q What is your book?

A I wrote a book with Mary Mannes called Uncoupling. It deals with divorce.

MR. GRUMBACH: I didn't hear t[illegible]t.

THE WITNESS: It is called Uncoupling. It deals with divorce. There was a copy at the farm, and at one time Miss Pang looked at it, at one time John Lennon looked at it. One of them asked me to send a copy. I subsequently did. The subject of divorce generally came up.

Q Did there come a time when you saw Mr. Lennon again?

A Yes, I saw Mr. Lennon, I think, twice after that. I saw him once in a restaurant in New York City and I saw him once in Palm Beach. I saw him in Palm Beach the Christmas before last.

Q Where were you staying in Palm Beach?

A Well, I was staying at the Breakers Hotel. I was there with my daughter.

During a portion of the time I had stayed at the Breakers Hotel and during a subsequent portion I stayed as -- in a condominium somewhere in Palm Beach at the same place where Mr. Lennon staved.

Q Did you have any conversations with Mr. Lennon?

A Yes. I asked Mr. Lennon how the record was going that he was doing with Mr. Levy. I presume he said fine. I don't remember what he said about it. He said, "Fine, it's okay."

We went out one evening with Mr. Lennon, Miss Pang, Mr. Levy, some other friends, I believe, of Mr. Levy. I don't remember whether or not my daughter was there or not. That's the only other time I saw him.

Q When you say you don't remember Mr. Lennon's exact response during that conversation when you asked him about the recording he was doing with Mr. Levy, do you recall whether he said, "I am not doing any recording with Mr. Levy"?

A Oh, no. He said, "Fine. Good." He gave me some response. He certainly didn't say that, no.

MR. SCHURTMAN: No further questions.

THE COURT: Cross.

MR. BERGEN: No questions, your Honor.

MR. PRETTYMAN: No questions, your Honor.

THE COURT: All right.

Thank you, Mr. Sheresky.

(Witness excused.)

THE COURT: All right, Mr. Seider, please resume.

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H A R O L D S E I D E R , called as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

CROSS EXAMINATION (Continued)

BY MR. SCHURTMAN:

Q Mr. Seider, before the break I believe I started to ask you whether any terms were discussed at the October 8th meeting at Cavallero, and specifically whether there was any discussion about the prices at which these YV albums are sold. Was that --

MR. PRETTYMAN: Can I have that question read.

THE COURT: Let's have the question.

(Question read.)

MR. PRETTYMAN: I object to that as a compound question. It doesn't make any sense internally because --

THE COURT: Just to save time, can you break it up and rephrase it.

Q Was there any discussion about the prices at which television albums are sold?

A I think there was some discussion about albums that had -- depended upon the number of cuts, like a double album would sell for more and a single album would sell in the range of $4.98, but I think that was the area of discussion.

Q Was anything said about the prices normally charged for Mr. Lennon's albums?

A I don't believe so.

Q Was anything said about how long these television promotions take?

A I don't recall, Mr. Schurtman, other than the fact I remember Levy indicating that he had been doing the Chubby Checker package for a substantial period. I really don't recall at this time.

Q Do you recall Mr. Levy explaining that in a TV campaign the country is divided into sections and commercials are run first in certain sections of the country?

A On October the 8th?

Q Yes.

A I don't recall, Mr. Schurtman.

Q Give us your best recollection of what Mr. Levy said about the manner in which television albums are merchandised?

A Basically, in terms of how it enhances the career of various artists; it's a great --

THE COURT: Just a moment.

I interrupted you in the middle of your answer. Would you pick that up, Mr. Seider.

THE WITNESS: If they can just read back the question and then --

THE COURT: All right. Read it back, please.

(Question read.)

(Continued on next page.)

jpbr 1 Seider-cross

pm

A Idea but I don't recall any specifics about the merchandising as such.

Q Was there any discussion at all about the mechanics of merchandising television albums?

A Other than the fact that he spends a lot of money on advertising, but I just don't recall the mechanics.

t Q Did Mr. Levy go into any detail about the type of packages he had done?

A You mean on television?

Q Yes.

A You mean like Chubby Checker or Fiedler?

Q Well, what did he talk about?

A He just talked about those packages, the fact that he sold those packages. Those packages are his packages. He mentioned American Graffiti, that he put that package together.

Q Did anyone ask Mr. Levy at that point to explain how these television packages work?

A I just don't recall.

Q Well, Mr. Seider, you have testified previously that when Mr. Lennon came in, he explained his problems with the Spector tapes, he explained that he wanted to bypass the critics, there was a discussion about television, people got enthused, started changing

titles, now did anyone raise a question to Mr. Levy, well, could you tell us how these things work, what actually happens?

A Mr. Schurtman, I said I don't recall that we went into specifics as to the mechanics as you call it of this television marketing, other than the fact that they advertise on television.

Q Mr. Seider, I believe there's been testimony that the meeting lasted from between two and a half to three hours, is that correct, approximately?

A I place it somewhere in about two hours, maybe two and a half, I don't know.

Q Let's pin it down a little.

Do you recall when you came in that evening?

A Somewhere between 9 and 9:30 and I think we left before midnight.

Q Okay. Now, what did you discuss during that two and a half hours? Did you discuss -- well, tell me again just the subjects, very quickly.

A After we exchanged pleasantries and small talk, we got into the discussion of the Spector problems. That took some time. Then Levy said "I'm out of pocket" and then there was some discussion with regard to what John was doing with regard to the Spector tapes.

Then we got into the discussion of Levy having done television packages, it was a wonderful idea. We got into the discussion that I -- permission would be needed to put out any television package and that you would have to see EMI, Len Wood .

"When are you getting on the plane, when are you leaving?" There was the watch incident. There were titles being bandied about. There were figures, three, five, seven million units that could be sold.

Q That is all you can recall at this point?

A It is coming to mind right now.

Q What was your understanding of how things were left at the end of that evening?

A It was left that John would resume the recording of the oldies album and that -- I think I indicated to Levy in response to the question of the going to England and I think I said it was premature that John should finish the album before I would go and talk to EMI about the possibility of putting this out through television.

That was about it.

THE COURT: I am sorry, gentlemen, I have to adjourn now. I will see you at 10 o'clock tomorrow morning.

(Adjourned to January 30, 1976, at 10 a.m.)

Big Seven Music Corporation, et al.

v. 75 Civ. 1116

John Lennon, et al.

NEW YORK, NEW YORK

JANUARY 30, 1976
10:00 o'clock a.m.

- - -

(Trial resumed.)

- - -

(In open court.)

MR. SCHURTMAN: May I start the morning's proceeding by handing you another brief, your Honor. This is a brief essentially in the issue of assignment and license and it covers both American law and English law.

THE COURT: You have given it to the defense, right?

MR. SCHURTMAN: Yes.

MR. BERGEN: We have a memorandum too, your Honor, plus a set of the transcripts redlined as you requested, not the entire transcript.

THE COURT: Which transcript?

MR. BERGEN: The deposition of Mr. Levy and Mr. Kahl redlined with those portions.

THE COURT: Mr. Schurtman --

MR. BERGEN: And we have a brief, your Honor.

THE COURT: Fine.

MR. GRUMBACH: Shall I --

THE COURT: Do you have a brief?

MR. GRUMBACH: Yes.

THE COURT: Is it dated in?

MR. GRUMBACH:Yes.

I hand two memoranda to the plaintiff's counsel and I have duplicates here for the Court, if you want.

THE COURT: It is correct that I requested the defense counsel to designate the portions of the Levy and Kahl depositions which they wish to introduce. I think they have a right to introduce certain of Mr. Levy's deposition to the extent relevant. This looks to me like it is a pretty modest designation. Would you like to look at those?

MR. SCHURTMAN: I won't object to the designation as such but I would like to supplement those portions with whatever is appropriate.

THE COURT: I think it would be better to have these things marked for identification as the next defendants' exhibits. The Levy deposition is three bundles or three clips of papers and that will be marked.

MR. BERGEN: The next two numbers are CM and CN.

THE COURT: Let's call the three volumes of Levy testimony CM-1, 2 and 3 for identification and then -- actually it is Philip Kolsky known as Philip Kahl and his deposition transcript will be Defendant CN as in Nancy, right? Is that the right nomenclature, Mr. Bergen?

MR. BERGEN: Right, your Honor.

THE COURT: We will give those to Mr. Schurtman and he can see if he has any problem with that.

MR. BERGEN: We would like to add two more exhibits, the State Court complaint which will be CO and an affidavit that Mr. Levy iled in the State Court in support of a motion for a general preference which is Defendant Exhibit AV. We have already marked it. It was premarked.

THE COURT: What is the number for the complaint?

MR. BERGEN: CO.

THE COURT: Again, the affidavit is AV?

MR. BERGEN: Yes, sir.

We move all of these into evidence, your Honor.

THE COURT: I am going to reserve. On the Exhibits CM-1, 2 and 3 and CN, the deposition transcripts,

I think they will come in to the extent they are marked and not objected to and so forth. I will reserve that until Mr. Schurtman has looked at the passages and when can you do that, Mr. Schurtman, over the noon hour?

MR. SCHURTMAN: I will try.

THE COURT: Okay. Then on CO, the State Court complaint, any objection to that?

MR. SCHURTMAN: No objection.

THE COURT: And the affidavit AV, any objection?

MR. SCHURTMAN: No objection.

THE COURT: CO and AV are received.

(Defendants' Exhibits CO and AV were received in evidence.)

H A R O L D S E I D E R, resumed.

CROSS EXAMINATION (Continued)

BY MR. SCHURTMAN:

Q When we finished up yesterday, Mr. Seider, you had given us your best recollection of topics that were discussed at the October 8th meeting. Have you thought of anything else overnight?

A I hadn't thought about anything else overnight except going to sleep.

Q Did you reread your deposition overnight?

A No.

Q At the October 8th meeting did you tell Mr. Levy that you hoped EMI might agree to let the album be sold on television since Lennon's contract with EMI was going to expire in January 1976?

A I believe I may have indicated to Mr. Levy the fact that perhaps EMI might be inclined to go along because John's contract was going to expire in January 1976.

Q I am not sure I follow. What was the relation between one and the other? Why should the fact that John's contract expired in January 1976 induce EMI to give its consent?

A It might be a factor. I didn't say it would induce.

Q Explain to me why it would be a factor.

A They may want to consider the fact that they want to be responsive to John's requests in view of the fact that they wanted to perhaps renegotiate with John and have John re-sign with them.

Q Didyou mention at the October 8th meeting that the Beatles were working on a settlement of their internal disputes?

A On October 8th?

Q Yes.

A I don't believe I mentioned that at all.

I don't recall that that came up.

Q Did you ever tell Mr. Levy at any time that the Beatles were working on a settlement and that the settlement was pending?

A I seem to recall that some time in December I had a conversation with Levy on the telephone and I had indicated that for the balance of December I was going to be preoccupied with the finalization of the Beatles'settlement during that month and that I would be coming to New York in the middle of the month in connection with that settlement or that finalization.

Q During that conversation or at any other time did you tell Mr. Levy in words or substance that the settlement agreement would result in more money for John individually?

A I think I said to Levy, in very general terms my recollection is, that as a result of the settlement the individual recordings would be free of the partnership and now the moneys would flow from the partnership pot to the individual who made that recording.

Q Why did you tell that to Levy? Why should he be interested?

A I don't know. I just may have just volunteered it.

Q Isn't it a fact that you told it to him in the context of saying let's hold up working out the written agreement until the Beatles' settlement is signed so that John can get more money?

A No.

Q You just volunteered this type of private internal information?

A I said I was going to New York in connection with the finalization.

Q But why would you volunteer to an outsider if he had no economic interest in the matter an important term of the Beatles' settlement?

A Mr. Schurtman, I volunteered it. Why I volunteered it, I don't know. I volunteered it.

Q All right.

Going back to the October 8th meeting --

THE COURT: Wait a minute. Wasn't something said yesterday about retroactivity?

THE WITNESS: Yes.

THE COURT: Let me ask you, what you have just described to us, as I understand it is the idea that under the settlement if one of the Beatles makes a record he could keep the money individually whereas before his record proceeds would go to the partnership, so to speak?

THE WITNESS: There was a dispute with regard to the flow of funds from individual recordings as opposed to group recordings.

THE COURT: That was in dispute?

THE WITNESS: That had been in dispute since I think 1971.

THE COURT: And the idea of the settlement was to clear up that dispute?

THE WITNESS: That is correct.

THE COURT: So individual recording proceeds would go to the individual?

THE WITNESS: That is correct.

THE COURT: Just a second.

Let us suppose that Mr. Lennon had signed a written agreement with Mr. Levy on, say, October 31, 1974, is it correct that as of that time there wuld have been a dispute as to whether the proceeds of that record would go to Mr. Lennon or would go to the Beatles' partnership?

A No, what had taken place, your Honor, if I may just clarify, and just to answer the hypothetical, if there was any such written agreement I would have made that conditional upon the finalization of the Beatles' settlement. In July of 1974 a draft settlement agreement was

initialed by the respective advisors to the individual Beatles. I believe it was some time during the week of the 20th which is my birthday, around that time. Following that papers supplementing that initial draft were circulated and the meetings in December were for the purpose of the finalization of that draft, the implementation of that draft and the execution of all the papers relating to that July event to be signed by the individual Beatles themselves.

THE COURT: Was this draft that you mentioned, had that be circulated by October 1974?

THE WITNESS: It was initialed. In fact, I believe drafts amplifying that draft were circulated.

THE COURT: You did mention a particular draft. Had that been initialed before October '74?

THE WITNESS: Yes, in July. In fact, I think --

THE COURT: I see.

THE WITNESS: I think the thing that during Graham's testimony -- the 12 or 20 page document was the agreement that had been initialed by the individual advisors and there were whole sets of papers that amplified that agreement. That was done between July and December of 1974.

But the agreement that was signed by the

individual Beatles in December was the same draft, substantially the same draft initialed by the individual advisors in July.

THE COURT: Did that draft resolve or contain language which would resolve the dispute?

THE WITNESS: That is correct, your Honor.

THE COURT: Let's go back to my hypothetical. Let us suppose that Mr. Lennon had signed a contract to do an album for Mr.Levy with Mr. Levy distributing it and again my language is non-technical but bear with me.

THE WITNESS: I understand.

THE COURT: Let us suppose that a subject contract had been signed, let's say, the end of October 1974 and I ask you whether such a contract would have been subject to the dispute you described and you started to answer --

THE WITNESS: At any such contract assuming the consent, et cetera, would have been conditional upon the finalization of the Beatles' settlement because if the parties decided not to sign, they changed their minds between July and when it was finalized then there wouldn't have been a settlement.

THE COURT: Was any discussion of that particular problem had between you and Mr. Levy at any

time?

THE WITNESS: In terms of what?

THE COURT: When I say this problem, I mean the problem of how to do a contract with Levy in view of the dispute and the draft and so forth, that package of problems, was that discussed between you and Levy at all?

THE WITNESS: Not at all, your Honor, no.

(Continued on next page.)

THE COURT: Okay.

THE WITNESS: In fact, my recollection of my telling that to Levy was to advise him that I would be coming to New York in the middle of December for the finalization.

THE COURT: Are you saying to me that in your view any contract with Mr. Levy, say, in October 1974 would have been conditioned in such a way that if The Beatles' settlement hadn't been signed the contract with Levy wouldn't have gone through?

THE WITNESS: It couldn't because there would be a dispute in terms of Lennon's entitlement to the moneys.

THE COURT: Were any contracts on behalf of Mr. Lennon signed during this period with such a provision?

THE WITNESS: No, your Honor. If I can assist your Honor, until the settlement was signed by the principals, by the four individual Beatles in December, all of the money that the individuals earned or were derived from the individuals recordings were held by the receiver of the Beatle partnership. So, for example, I made reference at some point to the Spector producer agreement and a party to the Spector producer agreement

which was signed -- the drafts were circulated I think the beginning of May 1974 and were signed I believe some time in November 1974.

The receiver of the Beatle partnership had to be a signatory to that agreement because he was the one who had all the funds flowing from the sale and exploitation of the individuals recordings as well as the group recordings.

THE COURT: When was the receivership set up?

THE WITNESS: I believe in April of 1971.

THE COURT: You are sure the Spector producer agreement was 1974 rather than 1973?

THE WITNESS: I am sorry, when I referred the Spector producer agreement I am referring to Spector producer agreement with respect to the Oldies album John had been doing. I believe it was signed in November of 1974.

Yes, November 1974.

THE COURT: I don't understand. I don't know, but I don't understand wehat was the Spector producer agreement.

THE WITNESS: It related to the various cuts that had been done, where the recording had begun some time in September, October 1973, the agreement with regard to

Spector's entitlement to a producer royalty was signed I believe in November 1974

THE COURT: This was the agreement that occurred after they got the Spector tapes back?

THE WITNESS: That is correct. One of the bases for getting the Spector tapes back was the resolution of what the Spector royalty would be.

THE COURT: Can you just describe briefly what that agreement was and who were the parties to that?

THE WITNESS: I believe it was an agreement between EMI and I don't know whether it was Phil Spector or Phil Spector Enterprises or Interglobal Management because those names pop up, but I know that John was a signatory to that, the receiver was a signatory to that, and I think it was one of the Spector companies which was a signatory to that and EMI was a signatory to that.

THE COURT: Was this an agreement under which Mr. Lennon would earn --

THE WITNESS: No.

THE COURT: It was an agreement to pay something to Spector in the event --

THE WITNESS: That sales were made from the recordings.

THE COURT: Why was the receiver there? Why

was he a party?

THE WITNESS: The receiver was a party because the agreement provided that of the royalty to Spector, which I believe was 3 per cent, at least for the United States, 1-1/2 per cent was to be paid by EMI out of whatever its earnings were and another 1-1/2 per cent was to be paid out of the Lennon royalties. At the time the receiver was the recipient of those royalties.

THE COURT: Okay, I understand.

Just one more thing. Are you saying that from 1971 on the money earned by John Lennon on royalties for his individual recordings such as Walls and Bridges, and so forth, was paid by EMI to the receiver?

THE WITNESS: That is correct.

THE COURT: Was it all held in a fund that was built up or were disbursements made to Mr. Lennon? I didn't mean to get into the detail but just in general.

THE WITNESS: I think what was taking place -- and this was true not only of Mr. Lennon but all The Beatles -- I believe they were each receiving a monthly stipend from the receiver of I believe 1000 pounds a month from this pot of money that the receiver was holding. I believe that it was increased to two or three thousand pounds a month. Those were the only moneys that John

was receiving from the results of his recordings. That is as an artist.

THE COURT: Was this only a kind of an advance? Were there much greater amounts in the fund being held?

THE WITNESS: Yes, a very substantial amount of moneys. It wasn't necessarily an advance, your Honor.

THE COURT: All right.

Was a contract entered into by Mr. Lennon for Walls and Bridges when that came out in 1974? Is that something where there would be a separate contract between Mr. Lennon and Apple and EMI?

THE WITNESS: No. If I understand the question properly the Walls and Bridges was a recording that was made under the 1967 --

THE COURT: So there wouldn't be a new contract?

THE WITNESS: No, your Honor.

THE COURT: All right, Mr. Schurtman.

BY MR. SCHURTMAN:

Q I take it, Mr. Seider, if a contract had been signed with one of Mr. Levy's companies on October 8, 1974 the royalties payable to Mr. Lennon would have been handled in the same fashion as the royalties payable to Lennon under the Walls and Bridges album, isn't that true?

A No.

Q Why would it have been different?

A Because the royalties would have to be paid to EMI and it's EMI.

Q Couldn't Lennon pass along the royalties to EMI which would then pay it to the receiver or whatever was done?

A I don't know, Mr. Schurtman. I would assume that if EMI is in the picture, the moneys, under the Apple agreement, flowed notwithstanding the Apple-Capitol agreement. The moneys flowed from Capitol to EMI.

Q At the October 8th meeting, you have been very clear in your testimony that you told Mr. Levy that in order to consummate a deal the EMI consent would be necessary, isn't that so?

A I didn't use words "in order to consummate a deal". I said you would have to obtain the permission of EMI.

Q Right.

I believe yesterday you started to testify that Capitol's consent wohld also be necessary but in response to questions by his Honor you said you never told Levy about Capitol's consent, if I remember correctly.

A I don't recall. I know that Capitol was

mentioned but I said you have to go to the source and you should start with EMI first.

THE COURT: Wait a minute. You say you know Capitol was mentioned. That is the first time I have heard of this. In what context was Capitol mentioned?

THE WITNESS: At the meeting?

THE COURT: Yes, if it was. I don't know if it was or wasn't.

Was it?

THE WITNESS: It was mentioned the fact that although John was distributed in American through Capitol he was signed to EMI exclusively for the world.

THE COURT: Who said that?

THE WITNESS: I believe I did.

(Continued on next page.)

THE COURT: Go ahead, Mr. Schurtman.

BY MR. SCHURTMAN:

Q Well, did you or did you not say anything about Capitol's consent being necessary?

A My recollection, Mr. Schurtman, is that should first start with EMI.

Q No. What I am interested in is what you said not what you thought at that point.

A That's my recollection.

Q Did you also tell Mr. Levy that in addition to EMI's consent -- well, you say you never told him Capitol's consent was necessary, but in addition to EMI's consent that it would also be necessary to first work out The Beatles settlement so that the money would not go to the receiver?

A On October 8?

Q Yes.

A No.

Q You never told him that was the problem with the deal, did you?

A On October 8th? No.

Q All right. You have mentioned something called a preliminary agreement, and I think on your direct testimony you used the English expression heads of agree-

ment."

Is that the same thing you were just talking about, the July --

A I don't know what -- I may have said it's like a heads of agreement.

Q Let me just pin that down. You say that there was a preliminary agreement initialed by The Beatles advisors in July of 1974; is that correct?

A Yes.

Q Was that drawn up in the English manner and referred to as heads of agreement?

A I don't believe it was used -- the words of heads of agreement, I think I said in my testimony it's like a heads of agreement.

Q I see. Was your understanding that this was in and of itself a binding agreement, or did you regard it as a memorandum of understanding, or what?

A I did not regard it as a binding agreement upon Mr. Lennon nor upon any of the other Beatles.

Q Did that agreement provide for a cutoff -- I shouldn't say that agreement -- that preliminary agreement, if you will, did that provide for a cutoff date after which each individual Beatle would get his own royalties on his own recordings?

A It was agreed that, I believe from and after October 1, earnings from all individual recordings would flow to the individual Beatles.

Q You say that was in the July preliminary agreement?

A I believe so.

Q Do you have that agreement with you, Mr. Seider?

A No, I don't.

Q Is it readily accessible?

A I think we can get a copy of it, or a Xerox copy of it.

Q I would like to see a copy, if I may.

But getting back to the October * meeting now, if a contract had been signed on October 8 with Mr. Levy, or one of his companies, I take it under your testimony that would have been, in any event, conditional, among other things, upon The Beatles settlement agreement being finally signed?

A That's correct.

THE COURT: Can I hear the last question and answer.

(Record read.)

Q And if such a contract had been signed on October 8, and had contained such an express condition,

and if thereafter The Beatles settlement agreement was signed on December 29, would the income to Mr. Lennon, under the October 8th agreement, then have gone to him individually under that retroactivity clause in the final Beatles settlement agreement?

I know that is quite a mouthful, but do you follow me?

A I have a feel for what you are driving at.

As I understand, this was a post-October 1 release or recording to be released the moneys would have flowed in some way to Mr. Lennon.

THE COURT: So the answer is yes to Mr. Schurtman's question?

THE WITNESS: Yes.

Q Getting back to the Spector agreement for one moment, I believe you told his Honor that the Spector agreement you referred to was the 1974 agreement; is that correct?

A I believe it was executed -- I don't know when all the parties executed it, but I think some time in November.

Q Was there also a 1973 agreement with Mr. Spector?

A '73?

Q Yes.

A I have no knowledge of it.

Q Let me just ask you point blank:

Did Mr. Spector have a written contract with anyone in the fall or winter of 1973 covering his production of the Oldies album?

A None that I know of, Mr. Schurtman.

Q Getting back to the October 8th meeting, did you know as you left that meeting that Mr. Lennon had invited Mr. Levy to come to the record plant the next day to listen to the Spector tapes?

A I don't know. I have a vague recollection of some discussion about listening to the tapes.

Q Did you know for what purpose Mr. Levy had been invited?

A I don't recall. I may not have been listening attentively.

Q Did you know or did you learn at some subsequent point that Mr. Levy had been at the record plant to listen to the Spector tapes?

A Yes.

Q Who told you?

A I believe I found out on the evening of October 9 at some point or in the Ahmet Ertegun dinner, when I

was informed, I believe, possibly by May Pang that we were invited to a birthday party for John at the Club Cavallero.

Q Who told you that Mr. Levy had been at the Record Plant, was it John or May Pang?

A I really don't recall who told me. It may have been May, but I just don't remember.

Q Do you recall that they told you about what had happened at the Record Plant?

A Just that John had -- there was a party, the people at Record Plant had had a party and had one of these big hero sandwiches that they cut up and they drank some champagne.

Q Were you aware of the fact during the next week or ten days that Mr. Kahl was working with May Pang to pull together sheet music on old recordings?

A I again have a vague recollection that Bernard had met Phil and something about sheet music, but beyond that I just don't recall.

Q Did you ask anyone, or did you ask yourself, for that matter, why they were working together on this?

A I don't recall asking anyone. I'm not sure if I asked myself, but it seems like something that still always seems to be doing.

Q Did there come a point where you learned that a cassette containing the Spector tapes had been delivered to Mr. Levy?

A I really don't remember it.

Q Did you learn that John Lennon had held rehearsals with his musicians at Mr. Levy's farm?

A I think I learned after Mr. Lennon had come back from the farm.

Q From whom did you learn it?

A I don't know whether it was from John or from May. Probably from May.

Q Did she tell you about what had gone on at the farm?

A Just that they had gone up to the farm and it was -- there were musicians up there.

Q Did you inquire of May or John or anyone else why they had held rehearsals at Mr. Levy's farm?

A I have no idea. No, I didn't inquire.

Q That didn't strike you as odd?

A No.

Q Did you ever tell Mr. Lennon to stay away from Mr. Levy and not keep discussing business with him?

MR. BERGEN: I object to the form, your Honor. I don't think there was any testimony that

he was discussing business with Mr. Levy.

MR. SCHURTMAN: Mr. Lennon so testified.

MR. BERGEN: I don't believe he did.

THE COURT: It is a question, and I will overrule the objection.

A I may have indicated to John at some point, I don't know exactly when, not to be close with Morris.

I don't think I ever said to John, "Don't discuss business", because I never say that to John. He doesn't discuss business, as I understand business.

Q During the period of October, November and December, 1974, Mr. Seider, what was your understanding of what would be done with the album that John Lennon had finished recording in October?

A I didn't --

MR. GRUMBACH: I object to the form of the question, your Honor.

THE COURT: May I hear the question.

(Question read.)

THE WITNESS: I didn't know when John --

THE COURT: There is an objection.

What is the objection?

MR. GRUMBACH: The objection is that it is a compound question. First, the question contains really

two questions: Did he finish the recording in October, which is implicit in the question, but not phrased as such. And what did you do with it?

If he wants to ask implicitly two questions he ought to do it broken up.

MR. PRETTYMAN: Can I join in the objection?

THE COURT: Yes. It is a question.

Mr. Schurtman is not establishing the facts, but --

MR. GRUMBACH: It is an improper question, your Honor.

THE COURT: It is a matter of semantics.

MR. GRUMBACH: He is trying to get the witness to answer a false question.

THE COURT: During that time did you have any understanding as to what would be done with whatever had been made in whatever state it existed?

THE WITNESS: A, I didn't know that John had finished the recording. I don't get involved in that end.

B, at some point I think I said that in November I met with Morris -- some statement about John, I don't think I I made it. Morris may have said, "He's finished the recordings. Talk to EMI."

I said I wouldn't talk to EMI until the recordings were along the road, substantially down, the tracks had been laid down and he had done the basic remixing.

He may have some other things to be done, because then people would be in a position to see what this recording contained.

THE COURT: You may continue, Mr. Schurtman.

BY MR. SCHURTMAN:

Q Subsequent to the November 18 meeting with Mr. Levy and Mr. Graham, were you still contemplating a possible deal with Mr. Levy?

A We had discussed about getting the EMI's permission for Mr. Levy's involvement in the TV merchandising. I'm sorry, I got carried away.

Can I just hear the question.

(Question read.)

THE WITNESS: I was contemplating talking to EMI about their permission with respect to the TV merchandising of this old -- or this Oldies package.

Q You mean their permission to Mr. Levy's company?

A And to have Mr. Levy be involved.

Q All right, when did you first learn that John Lennon had delivered a 7-1/2 inch master tape to Mr. Levy?

MR. BERGEN: I object to the form of the question, your Honor.

THE COURT: What is the objection?

MR. BERGEN: Master tape. Mr. Lennon has testified that it was a 7-1/2 ips, a rough mix copy. Our position is that a 7-1/2 is not a master tape.

THE COURT: Mr. Schurtman has his position.

MR. BERGEN: But the question assumes that it was a 7-1/2 ips master tape.

THE COURT: Really, this is not helpful. I said it five times that Mr. Schurtman does not establish the facts, and I am not going to be so childish as to assume from any answer that Mr. Seider gives that Mr. Seider has suddenly adopted the plaintiffs' case.

His question -- we can spend all day rephrasing questions and getting -- the point is completely a different point. It is about what happened that Mr. Seider knew about -- that is what is being asked.

MR. BERGEN: I withdraw the objection.

THE COURT: All right. Let us move along. What is the question?

(Read.)

THE WITNESS: I think some time in -- my recollection is some time in December, I think -- I think it was John who said something to the effect that Morris had asked for a copy of the recording to listen, and that he had asked, and John had said "Do you want a cassette or a 7-1/2", and Levy said "A 7-1/2" and then he had given Levy a 7-1/2 and -- so some time, I think, in December, your Honor. I am not sure of the date.

THE COURT: After my stern lecture to Mr. Bergen, I think he was right.

You have to rephrase your questions so that -- that is a trap.

MR. SCHURTMAN: I didn't mean to trap the witness.

THE COURT: I don't think you meant it, but, in other words, somebody could argue in the Court of Appeals, if this ever gets there, that this was an admission. Let's avoid that.

I do want to hear the narrative answer of Mr. Seider to that.

(Read.)

THE COURT: Let's have the record clear -- you are not meaning to admit that this was a master recording or any characterization made by Mr. Schurtman, right?

THE WITNESS: That is correct, your Honor.

THE COURT: All right. Let us go on, Mr. Schurtman.

BY MR. SCHURTMAN:

Q You just testified that John told you that Morris had requested to and that Joun had said "Do you want a cassette or 7-1/2?"

Then Mr. Levy had said "I want a 7-1/2."

When did you recall for the first time that John had told you that he had at first offered a cassette to Mr. Levy?

A When did I recall? You mean in terms -- I don't understand the question.

Q All right. Let me read your deposition testimony and we will get to the point.

Question by Mr. Kanzer --

MR. GRUMBACH: Page, please.

MR. SCHURTMAN: Page 203, who frames questions much more accurately than I do.

"Q Prior to December 1974, did Mr. Lennon indicate

to you that he had sent or caused to be delivered a tape of any of his recorded performances to go to Mr. Levy or any company with which Mr. Levy was connected?

"A I seem to recall that John mentioned to me that he had sent Morris a 7-1/2 inch tape for Morris to listen to at Morris' request."

Now, in your answer in the deposition you made no reference to any discussion about a cassette. Is this something that occurred to you after you heard Mr. Lennon testify about it?

A No.

Q Is it your present recollection that Mr. Lennon did specifically mention a cassette when he talked to you in December, 1974?

A I believe -- I recall, I think he said a cassette or a 7-1/2, and he had sent him a 7-1/2.

Q Did you ask him why he had not simply sent a cassette for listening purposes?

A No.

THE COURT: Didn't you say -- let's get the record straight. Didn't you say a few minutes ago that Mr. Levy asked for the 7-1/2, or that Lennon told you that --

THE WITNESS: I understood from Lennon's conversation that he gave Levy the option, do you want a cassette

or a 7-1/2, and Levy said 7-1/2, so I left it at that. I wasn't going to argue with John, your Honor.

Q Do you know of any instance where Mr. Lennon had ever given a 7-1/2 for listening purposes to anyone other than MEI, Apple or Capitol?

A I don't recall. You are talking about this recording?

Q Any recording of Mr. Lennon's.

A Made at any time?

Q Yes.

Is he in the habit of giving people 7-1/2 tapes for listening purposes?

A He once gave me one, a 7-1/2 to listen.

Q A 7-1/2 tape?

A That's right, to listen.

Q Which album was that?

A It wasn't an album. It was a tape that I think he had done with Mick Jagger I think on a song called Too Many Cooks.

Q I am talking about a tape of an album that he was recording, a commercial album. Is he in the habit of giving away 7-1/2s for listening purposes?

A I don't know, Mr. Schurtman.

THE COURT: I don't really know the difference

between a 7-1/2 and a cassette.

MR. SCHURTMAN: A cassette is the little thing that we offered --

THE COURT: Maybe we can get testimony on that.

THE WITNESS: The 7-1/2 is like a reel to reel and the cassette is that thing there.

THE COURT: I'm still in the monaural age, you see.

THE WITNESS: a 7-1/2 is a reel to reel tape. It is on a disc, you may say, whereas a cassette is a small tape. That is a cassette on the left.

Q Plaintiffs' 25 is a cassette, right, Mr. Seider?

A Yes.

Q Is that monaural?

A Monaural?

Q Does it have double track?

A I'm not really knowledgeable on that.

Q Then I show you 26-B. Is that a 7-1/2?

A I don't know. It is a tape.

THE COURT: WE have those 7-1/2 tapes in evidence.

MR. GRUMBACH: The tape can go at any speed.

That is the problem. It is on a 7 -- a 7-1/2 is on areel, but it could be a 15 as well. You don'tknow by looking at a tape, only by hearing it at what speed it goes on the machine.

MR.SCHURTMAN: A cassette is simply a monaural cassette --

MR. GRUMBACH: That is not true.

MR. SCHURTMAN: I stand corrected on that.

THE COURT: This is a very simple point, but I just physically would like to get it a little clearer.

Mr. Seider, a cassette is one of those little things like 25-A and you can play it on a very simple playing machine, I take it, is that correct?

THE WITNESS: That is correct.

THE COURT: Now, these tapes, whether it is 15 ips or 7-1/2 ips, it is a reel, what, about six inches in diameter?

THE WITNESS: It is about six inches.

THE COURT: Do you have to have a different piece of equipment to play that on?

THE WITNESS: Yes. You play it on a tape recorder equipment as opposed to a cassette equipment.

THE COURT: A lot of people have 7-1/2 tape recorders?

THE WITNESS: Oh, yes. Ampex.

MR. GRUMBACH: One thing ought to be clarified, maybe I can just ask Mr. Seider one question?

THE COURT: Surely.

BY MR. GRUMBACH:

Q Mr. Seider, are there cassette playback machines that are very sophisticated and expensive machines?

A Yes.

Q And are there very inexpensive tape recorders that play 7-1/2 inch?

A Yes.

MR. GRUMBACH: Thank you.

THE COURT: That's fine.

Go ahead, Mr. Schurtman.

BY MR. SCHURTMAN:

Q When Mr. Lennon told you that he had given a 7-1/2 inch tape to Mr. Levy, what was your response?

A I believe I said "I am sorry you did that."

Q Why did you say that?

A I don't like anybody to have copies of John's tapes.

Q Why?

A Things have a way of getting lost in this business, andpeople have a way of accumulating whatever

minutaie or artifacts circulated by the Beatles.

Q What was John's response?

A I don't recall.

Q Did you advise John at that point to ask Mr. Levy to return the 7-1/2?

A No, I think I just dismissed it.

Q Did anyone ever ask Mr. Levy to return that 7-1/2 inch tape?

A I didn't give it any weight.

MR. GRUMBACH: Before this trial, Mr. Schurtman?

MR. SCHURTMAN: Obviously.

A Before January 30th?

Q Yes.

A Pardon me?

Q Yes. Do youknow whether anyone asked Mr. Levy to return that tape?

A I didn't ask him.

Q And you don't know of anyone who did?

A I don't know.

Q You had a conversation with Mr. Levy in late December, 1974, didn't you?

A In Florida.

Q Yes.

Did youdiscuss the album with him at all?

A No. I recall -- well, I recall a very short conversation by the side of the pool in West Palm Beach where he asked if I had spoken or had -- had spoken to Len Wood, and I said no, and I indicated my pessimism about EMI granting permission.

Q Did you say you were going to seek EMI's consent anyway?

A Yes.

Q Did Mr. Levy say that he hoped you would get EMI's consent?

A He was always hoping that I would get EMI's consent. I don't recall if he had specific words to that effect. It was a relatively short conversation.

Q Does anything else stick in your mind about that conversation?

A I recall mentioning something about the Carpenters and Please Mr. Postman, which I think was a very big song at that time.

THE COURT: Were these songs Levy was putting out?

THE WITNESS: No.

THE COURT: What were they?

THE WITNESS: These -- in effect these were songs that had been rock and roll favorites or oldies from the late '50s and early '60s, like Please Mr. Postman, a very

famous song, and the Carpenters had rerecorded that, and it was, as we say in the jargon of the trade, it was a monster hit.

Q Does anything important about that conversation stick in your mind?

A Well, I believe in regard to -- I said to -- Levy said something "I hope you can get --" yes, I am sorry, thank you. Levy said "I hope you can get the permission of EMI. I like John, I don't want to sue him."

Q What did you say to Mr. Levy when he mentioned that he didn't want to sue John Lennon?

A I seento ecall that I said, "Well, we'll work something out", then the taxi came and I left.

Q Did you ask him on what basis he was going to sue Mr. Lennon?

A No. I think Mr. Levy called me aside at the pool when I was informed that the taxi to take me to the airport had arrived, and I didn't want to miss my plane and I left.

Q Were you at all concerned that Mr. Levy had mentioned the possibility of a suit?

A No.

Q What did you mean when you said "We'll work something out"?

A We'll work something out.

Q What did that mean to you?

A We will sit down and you will work something out.

Q Is that your best explanation of what that means?

A That is correct.

Q Hadn't John Lennon told you prior to that December conversation with Mr. Levy that Alan Klein had told him in November that Levy claimed he had a deal with Lennon?

A No. I don't believe that John said that to me.

THE COURT: Can I hear the question and answer?

(Read.)

Q Do you follow the question?

THE COURT: I don't follow the question.

Q Let me take it in two parts:

Did there come a time when John Lennon told you he had a had a conversation with Alan Klein in November 1974?

A Yes.

Q When did he tell you about that?

A My recollection is that it was -- was that it

was -- was that it was some time in mid November, I think I was in New York at the time. And he called me up and he said something to the effect that he had been up to Alan's office, because he had been visiting Record World, and Alan had said "You don't need EMI's consent for mail order."

And I said to John, "That's not so. That's the club rights."

THE COURT: You said you don't need whose consent?

THE WITNESS: John said that Alan had told him you don't need EMI's permission for mail order and I think I said to John no, that is not so, that is the club rights. You need the permission, and that Alan was wrong.

Q Did John say anything else about his conversation with Lennon?

MR. GRUMBACH: With whom?

Q Did Mr. Lennon say anything else about his conversation with Mr. Klein?

A. I don't recall right now. Perhaps you can refresh my recollection.

Q Mr. Lennon has testified at page 929 about this conversation with Mr. Klein and his testimony at the bottom is "And he, Mr. Klein, said I hear you are doing an album with Morris Levy."

And Mr. Lennon's response to thatwas maybe. My only question to you is did Mr. Lennon tell you that Klein had said I hear you are doing an album with Morris Levy?

A I just don't recall that.

Q Did you hear from anyone else in the industry that Mr. Levy claimed that Mr. Lennon was doing an album with him?

A In the industry?

Q In the record industry.

A You mean people employed by record companies or promotion people, people like that?

Q Yes.

A I don't recall.

MR. BERGEN: Objection to the form again. He refers to anyone else. I don't think there has been any testimony that he heard from anyone.

THE COURT: I don't see any problem with that. Did you hear anything about Levy's claiming he had a contract?

THE WITNESS: Not from people inthe industry.

Q Did you hear from anyone else? You seem to be making a qualification.

A Well, if you are leading up to Mr. Hiliary Gerard --

Q Who is Hiliary Gerard?

A Hiliary Gerard is Ringo Star's advisor and I believe some time in October or early November Gerard had said "I heard you made a deal with Levy" and he had said that --

THE COURT: When did he say this?

THE WITNESS: Some time in October or November.

THE COURT: Who did he say it to?

THE WITNESS: He said it to me, your Honor.

THE COURT: What did he say again?

THE WITNESS: "I heard you made a deal with Levy," and I said to him "No, I didn't." I asked him where he had heard this and he said he had attended a party, I believe some girl had mentioned something to him.

Q I take it you don't consider Ringo Star's advisor as someone in the record industry?

A Hiliary Gerard is not in the record industry. He was formerly an investment banker and my understanding is that he does nothing except represent Mr. Star on Mr. Star's investment activities.

Q Let me ask you this, Mr. Seider, you had heard at least one rumor, according to your testimony --

A What?

Q I say you had heard at least one rumor according to your testimony that Mr. Levy claimed he had a deal with Mr. Lennon. Late in December Mr. Levy said that if EMI's consent is not obtainable he might have to sue Mr. Lennon.

Did you begin to wonder at that point what was going on, whether some sort of deal was being created, whether a lawsuit was being built up? Were you sensitive to what

was happening?

A I don't know what you mean by sensitive.

Q You are a lawyer.

THE COURT: I think you have to get a little more specific, Mr. Schurtman.

Q I take it at that point you simply weren't concerned?

A Morris says a lot of things, much of it is bluff, much of it is bullying, much of it is plain being a noodnick.

Q I suppose I can pursue that one for hours, when did Mr. Levy bully you --

A Aside from that I think he is more of a noodnick.

Q Would you care to define a noodnick --

THE COURT: Would you care to spell it?

THE WITNESS: In Jewish or English?

Q What do you mean by noodnick, as long as you brought it up?

A He just keeps pushing.

THE COURT: What does it mean?

THE WITNESS: Somebody who is just pushy and doesn't let up and keeps pushing and pushing and doesn't let up.

Q Mr. Seider, I show you Plaintiffs' 31, this is a letter dated January 9, 1975 from the pushy Mr. Levy to Mr. David Dolgenos --

A Should I take that as an admission on your part?

THE COURT: Okay, let's get on.

What is the number of that?

THE WITNESS: 31.

Q I believe you testified that you received a copy of this letter from Mr. Dolgenos on January 20th?

A That is correct.

Q And you remember that distinctly because your date stamp was on it?

A That is correct.

Q Do you have your copy of that letter with you?

A Yes, I do.

Q May I see it?

A Yes. Flip it over.

Q On the back it says received January 20, 1975, Harold Seider.

Can you identify the people in the right-hand corner where it says 1/13/75 CC: And the first name is Seider and I can't readthe other three names?

THE COURT: Why don't you get this marked so we know what you are referring to.

MR.SCHURTMAN: Mark it as Plaintiffs' Exhibit 99 for identification.

(Plaintiffs' Exhibit 99 was marked for identification.)

Q Who are the other three people listed in the upper right-hand corner of Plaintiffs' 99?

A Besides myself?

Q Yes.

A Weitzen.

Q Who is he?

A I believe an attorney at Marshall, Bratter. Coben, also an attorney, and Graham.

MR. SCHURTMAN: I offer this.

THE COURT: These are people it was routed to?

THE WITNESS: Yes, copies of that was circulated to them.

THE COURT: Are you offering 99?

MR. SCHURTMAN: Yes, I am.

THE COURT: Any objection?

MR. BERGEN: No objection, your Honor.

Q Did you say Mr. Coben was an attorney with Marshall, Bratter?

A That is correct.

MR. BERGEN: Mr. Weitzen is no longer an attorney with Marshall, Bratter.

Q Prior to sending you a copy of the letter I believe Mr. Dolgenos called you and read you its contents, is that not so?

A I believe he did.

(Continued on next page.)

Q If that notation is accurate on the letter Mr. Dolgenos must have received it on or about January 13, correct?

A I don't know when he received it.

Q Do you know when he called you?

A I don't recall. It may have been about that time.

Q When did you tell Mr. Coury and Mr. Menon of Capitol for the first time that Levy claimed he had a deal with Lennon?

MR. BERGEN: Objection.

THE WITNESS: I never told him that.

MR. BERGEN: There has been no testimony that he told him.

Q You never told him that at all?

THE COURT: Ask him did he ever tell.

Q Did you ever tell Mr. Coury and Mr. Menon or anyone at Capitol that Levy claimed he had a contract with Lennon?

A No.

Q Why not?

A Because there was none.

Q I didn't ask you that. Repeat my question.

(Question read.)

Q The answer is no?

A Yes.

Q My next question is why didn't you tell them that Mr. Levy who had previously threatened to sue Mr. Lennon in December was now making a formal claim in a letter dated January 9 stating that he had a contract for this album?

A I didn't receive this letter until the 20th. I met with Coury prior to that time and I met with Menon prior to that time.

Q You met with Menon on January 14?

A I believe that is the date.

Q Does it refresh your recollection as to whether Mr. Dolgenos called you as soon as he received this letter?

A I don't know. David and I are in the habit of talking frequently so I don't know the exact date that David spoke with me.

THE COURT: Let's take a break now.

(Recess.)

THE COURT: And I ask you, Mr. Seider, I guess I continue to be puzzled about all these references to getting permission from EMI and so forth and not Capitol.

I know I asked you on two different occasions

but I would like things to make sense and it doesn't quite make sense to me yet.

Maybe I can put it this way:

If you and Mr. Lennon were interested in having Mr. Levy do the album Levy was a competitor of Capitol in a sense, wasn't he?

THE WITNESS: Well, they are both in the record business. Levy has different companies, yes.

THE COURT: But if Levy was going to do the album, I mean, that would mean that to some extent at least business would be taken away from Capitol, would it not?

THE WITNESS: It depends what doing the album means, your Honor. We never went into discussion.

THE COURT: I am just trying to get the general picture if you can help me.

Speaking in general terms Levy is in the record business and Capitol is in the record business?

THE WITNESS: That is correct.

THE COURT: They do different things but they are in the general business of distributing records, right?

THE WITNESS: That is correct.

THE COURT: And if you decide to go the Levy

route it seems to some extent you may not be going the Capitol route, right?

THE WITNESS: That is correct.

THE COURT: Again speaking in general terms.

THE WITNESS: That is correct.

THE COURT: As I understand from going over my notes you did not go after the October 8 meeting out to Capitol and say to Capitol "What do you think of this", that did not occur, right?

THE WITNESS: No.

THE COURT: Okay.

Indeed, is it not correct, that the first conversation you had with anybody at Capitol about this matter was the conversation with Rupert Perry in December?

THE WITNESS: Yes.

THE COURT: And at that time you didn't really talk to Perry, in substance you said I am very busy with The Beatles' settlement, I can't talk to you now, right?

THE WITNESS: That is correct.

THE COURT: The first real conversation of substance you had with anybody at Capitol was when Coury called you in for the luncheon at the Brown Derby around January 6, 7, 8 or something like that?

THE WITNESS: Yes, I think Thursday or Friday

of that week.

THE COURT: Can you fix the date?

THE WITNESS: I just remember, I believe it was a Thursday or Friday of that week, your Honor.

THE COURT: Do we have the calendar for 1975?

MR. BERGEN: I have one, your Honor.

THE COURT: Maybe by looking at a calendar you can tell me. Thursday was the 9th and Friday was the 10th. Was it one of those?

THE WITNESS: Yes, maybe it was the 9th or 10th. I know it was towards the end of the week, your Honor.

THE COURT: All right.

Could you tell me this: Was the fact that you didn't go to Capitol and only really spoke to Capitol when you were called in by Coury, was that the result of an apprehension or concern that Capitol might not want to let Levy have the deal because it would take business from Capitol?

THE WITNESS: I think my recollection again, your Honor, is when I spoke with Rupert Perry back in December he said that he had been asked by Menon to call me since my telephone conversations with Len, I said I wanted to discuss the marketing of the album John was

recording. When Perry called me he said Len asked him to call me and if it involved the marketing of the United States I should speak to him or somebody from Capitol and that is the way it was left.

THE COURT: That isn't my question. I have kind of an involved question. I wish you would just focus on it.

I am trying to get the sense of the reasons people were doing things here. I want you to tell me this:

In the series of answers in the last few minutes -- and I hate to have to go back, but you did not really have a discussion of substance about the matter with anybody at Capitol until Coury called you in and you had the luncheon on January 9?

THE WITNESS: That is correct.

THE COURT: Was that circumstance or circumstances the result of your concern or anxiety, or whatever you want to call it, that Capitol might not wish to have this record business go to Levy and would more likely wish to keep it in its own hands, or something like that? Can you tell me?

THE WITNESS: I think again, your Honor, it was really in response to an extension to Perry's statement

to the effect that Len Wood said that if it involves the marketing in the United States I should speak to Capitol or people from Capitol.

THE COURT: Isn't in answer to my question -- I am asking you basically why it was that you did not state to anyone at Capitol the circumstances of your conversation with Levy. You did not say anything about those conversations to anyone at Capitol until you were called by Coury on or about January 9. Why did you do that?

THE WITNESS: Because I was going to EMI first, your Honor.

(Continued on next page.)

THE COURT: Why were you going to EMI first?

THE WITNESS: Because EMI owned the rights throughout the world exclusively, and if you couldn't EMI's permission then you were at a dead-end at the very outset.

THE COURT: And there was absolutely no other reason in your mind whatever why you were not disclosing these matters through Capitol?

THE WITNESS: I don't believe so, your Honor. I start with EMI, they own the rights throughout the world. Also, they also are the majority shareholder of Capitol.

THE COURT: Were you going to EMI because you thought maybe EMI would exert leverage over Capitol and persuade Capitol not to compete, so to speak, or demand business in place of Levy getting the business?

THE WITNESS: I thought that EMI would have some persuasive effect Upon Capitol, or exert some leverage, as you indicated.

THE COURT: All right.

BY MR. SCHURTMAN:

Q Mr. Seider, Plaintiff's Exhibit 99, which is your copy of the January 9 letter from Mr. Levy to Mr. Dolgenos, indicates on its face that it was received and presumably reviewed by five lawyers:

Mr. Dolgenos, Mr. Seider, Mr. Weitzin, Mr. Cobin and Mr. Michael Graham, the gentleman who testified at this trial.

Did any of these five lawyers suggest, as far as you know, that an answer should be sent to Mr. Levy telling him that there was no contract in existence?

A I don't believe that I discussed that letter with any of those people, after I received that letter.

Q The point is, when you first heard about it from Mr. Dolgenos, on or about January 13 or 14 --

A I'm a little confused about your question.

Q Well --

A You seem to be picking up the previous question. I'm not sure how that came out.

Q Mr. Seider, you have testified that even though the letter was not physically received by you until January 20, that when Mr. Dolgenos received it in New York on or about the 13th he called you and read you its contents?

A I believe he did.

Q So at that time you did discuss it with him, didn't you?

A I don't know when he called me, Mr. Schurtman. As I said before, I have many conversations with David;

whether he called me the day he received it or the day after, I just don't know. I know I discussed it with David.

Q But, in any event, I take it that no one suggested that a reply should be sent to Mr. Levy?

A I told -- my recollection is, I told David I would take care of it. And it was left at that.

Q And you didn't send a reply to Mr. Levy?

A I hadn't received the letter and I wasn't going to reply to a letter that I had not received.

THE COURT: In other words, you say "David," you mean Dolgenos?

THE WITNESS: Yes, your Honor.

Q You didn't send him a reply after you received it on the 20th, did you?

A No.

Q You have testified that you did not consider it necessary to tell Capitol about Mr. Levy's claims. Did you tell them --

A I didn't say that, Mr. Schurtman.

Q Perhaps I misunderstood you. Let's clarify that point.

Let me ask you this, during your meetings of January 9 --

THE COURT: I don't understand where we are left on this question of the reply. I don't know whether it makes any difference or not.

If I am getting into privileged communications, why, stop me, but do you know whether there was a decision made as to whether or not a reply should be made to Mr. Levy's January 9 letter?

THE WITNESS: My recollection is that I told Mr. Dolgenos I would take care of it when I got the letter, and I think the circulation of the letter may have been just part of a general thing that is circulated among people who are involved in various of Mr. Lennon's activities.

THE COURT: After you got the letter did you yourself consider whether to send a reply?

THE WITNESS: I'm not sure, your Honor. I know I didn't reply.

THE COURT: Is this a situation where nobody thought about it or where they thought about it and made a decision, or where each person thought the other guy was going to handle it?

I don't get the picture.

THE WITNESS: I assume that is -- when I said to Mr. Dolgenos that I would take care of it, I assume

he thought I would follow through on it, and I didn't expect them to reply to it or make any formal response.

THE COURT: After you got the letter, did you think about whether to reply or didn't you think about it?

THE WITNESS: I really didn't think about it, your Honor, because I didn't give it any weight.

Again, I had said to Levy when he said he was going to send me the letter, or a letter -- this was back -- he called me some time during the first business seek in January. I said, "Look, Morris, you can write whatever you want, and I'm not going to get involved in a shit-kicking contest with you."

THE COURT: All right.

BY MR. SCHURTMAN:

Q At the meetings with Capitol on January 9 and January 14, did Mr. Levy's name come up?

A It came up in my meeting with Mr. Coury and it came up in my meeting with Mr. Menon on the 14th.

Q In what context did it come up?

A It came up in the context when I had, A, with regard to the Coury meeting, and again I don't know the exact date --

THE COURT: Can I have the answer that recites the dates when Levy's name up, please.

(Record read.)

THE COURT: Go ahead, please.

THE WITNESS: I had mentioned to Coury the fact that, again, John was interested in doing a television package, selling it through television, and that we had met with Levy and Levy had indicated a desire to be involved in the marketing of this album. Again it came up in the meeting with Menon on the 14th when I believe I said substantially what I just said before.

Q Mr. Seider, let's pin down the dates first.

Is there any question that your luncheon meeting with Coury was in January 9?

A I said I'm not sure of the date. I think it was the first business week -- the first business week in January.

Q All right. Let met just pin that down so we will at least have a date on the record.

Page 228 of your deposition you testified:

"Q On January 9 did you speak to Mr. Coury in person or by telephone?

"A I had lunch with Coury in Los Angelese at the Brown Derby."

In Paragraph 92 of defendants' statement of facts your lawyer stated:

"On January 9 Coury and Seider met in Los Angeles and Seider indicated Lennon's interest selling the Oldies album through television."

Have we got that date pinned down, that is January 9?

MR. GRUMBACH: Your Honor, let me suggest that that is just the kind of question that we had this morning.

If we look at page 227 of the deposition he says:

"I think I had a meeting with Al Coury, I believe on the 9th."

Then you go over to the next page:

"Q On January 9 did you speak to Mr. Coury in person or by telephone?"

THE COURT: What is the undisputed fact?

MR. SCHURTMAN: "On January 9 Coury and Seider met in Los Angeles and Seider indicated Lennon's interest in selling the Oldies album through television."

THE COURT: Do the defendants stick by that statement, that it was January 9, or not? That should be stipulated.

MR. BERGEN: We believe it is correct.

THE COURT: We will take it as January 9.

Go on.

Q In that same admission, the second meeting is stated as January 14.

MR. BERGEN: Can we get clear by what you mean by an admission.

THE COURT: I was read something by Mr. Schurtman which I understand was a submission by the defense counsel of undisputed fact.

I assumed that they regarded it as undisputed, and it said that the meeting at the Brown Derby with Coury was January 9.

I would assume that that is stipulated, admitted, whatever you want to say.

Is it or isn't it?

MR. BERGEN: Yes.

Q And the second meeting was January 14. I just want to pin down the date.

MR. BERGEN: Fine.

THE COURT: He has testified to the 14th.

MR. SCHURTMAN: There has been some uncertainty.

THE COURT: All right.

Q What did you tell Mr. Coury about Mr. Levy at the January 9 meeting?

THE COURT: He has already said that, hasn't he?

MR. SCHURTMAN: He started to say that he mentioned that Levy was interested in the television package.

Q Did you say anything else?

A About what?

THE COURT: Mr. Seider, you described a few minutes ago after the recess what -- you were describing what you told Mr. Coury on the 9th at the Brown Derby about Mr. Levy.

Do you recall that testimony?

THE WITNESS: Yes.

THE COURT: Is there anything else you told Mr. Coury about Mr. Levy?

THE WITNESS: Oh, I had mentioned -- I believe I had indicated to him the fact of the Come Together settlement, and this might be a way of resolving any disputes with regard to the Walls and Bridges use of only one hut.

THE COURT: All right, Mr. Schurtman.

Q You indicated that what might be a way of resolving that dispute?

A If we could use the services of Levy with regard to a television package.

Q That would resolve the dispute about the Come

Together settlement, right? Is that what you meant?

A It would resolve the dispute about the fact there was only one in the -- in the Wall and Bridges album there was only one Big Seven tune.

Q You told that to Coury?

A It is my recollection.

Q What did Coury say in response to that?

A He just listened.

Q Did you tell Mr. Coury at that point that Mr. Lennon had delivered a 7-1/2 inch tape to Mr. Levy?

A No, I didn't. I didn't even think about it.

Q We move on to the 14th.

You are now meeting with Mr. Coury and Mr. Menon, is that correct?

A That's correct.

Q At that conversation -- in that conversation did you tell Mr. Menon about the underlying litigation with Mr. Levy's company, the Come Together settlement, your view that a package with Mr. Levy might cure the problems with that settlement; did you mention any of that?

A I don't recall that I went into detail on that. I had assumed at the time of the meeting that Coury had filled Menon in with regard to our meeting the previous week.

am

THE COURT: When you say you didn't go into detail, you are referring to the Come Together settlement?

THE WITNESS: That is correct. I don't think I went into elaborate detail.

Q Was the subject of the dispute with Mr. Levy mentioned at the January 14th meeting?

A I don't recall. I just don't recall.

Q Did you tell either of these gentlemen that Mr. Lennon had delivered a tape to Mr. Levy?

A No, I didn't think about it.

Q By the time of the January 14th meeting, had Mr. Dolgenos called you about that letter which he received on January 13th?

A Again, Mr. Schurtman, I don't remember. I had many conversations with David, so I don't know whether I had a conversation with him with regard to that letter that day or the next day. Or maybe, perhaps, the day following.

Q Mr. Seider, I think we have established that Mr. Dolgenos read you the contents of that letter at some point between January 13th and January 20th when you received the actual copy, we just haven't fixed the exact date of the conversation.

THE COURT: Can I interrupt you? Is the 13th -- is there a stamp on Exhibit 31?

MR. SCHURTMAN: Exhibit 99 has a handwritten notation showing 1-13, copy sent to the other people.

THE COURT: Where is Exhibit 31?

MR. SCHURTMAN: 31 is Mr. Levy's file copy of the letter that was sent. This is the one that was received by the Marshall, Bratter firm.

THE COURT: Let me ask you, Mr. Seider -- all right. Proceed.

BY MR.SCHURTMAN:

Q When you received that call from Mr. Dolgenos some time between the 13th and 20th telling you the contents of this letter, did it occur to you at that point that you should tell Mr. Coury that this litigation situation with Levy that you had already told him about had now taken a serious turn; that Mr. Levy claimed he had a deal?

MR. PRETTYMAN: I object, your Honor.

MR. BERGEN: Objection, your Honor.

THE COURT: Let us read that back.

(Read.)

MR. PRETTYMAN: Nothing could be further from it --

THE COURT: I don't understand that. That implies that Mr. Seider had told Mr. Coury previously of a litigation situation.

MR. SCHURTMAN: He just testified to that, your Honor.

MR. PRETTYMAN: He absolutely didn't.

MR. BERGEN: No, he didn't.

THE COURT: He was talking about the Come Together settlement -- if that is what you are talking about.

MR. SCHURTMAN: That's what I mean.

THE COURT: This is very confusing, please.

MR. SCHURTMAN: I will break it up into two parts.

THE COURT: Do that.

Q On January 9 you had told Courty that there was a dispute about the Come Together settlement.

MR. BERGEN: I don't think that is what he testified to either, your Honor. I object to the form of the question.

MR.SCHURTMAN: We will do it another way.

THE COURT: I think that is --

MR. SCHURTMAN: Let me read Mr. Seider's deposition testimony, and I think that will clarify that point.

Q Page 228:

"Q On January 9 did you speak to Mr. Coury in person or by telephone?

"A I had lunch with Coury in Los Angeles at the

Brown Derby.

"Q As best you can recall.

"A Incidentally, I believe the date is the 9th.

"Q Was anyone else present at that meeting other than you and Mr. Coury?

"A Just Coury and myself.

"Q Can you tell us, to the best of your recollection, what you said to him and he said to you during the course of that luncheon meeting?

"A I reviewed with Coury the October '73 stipulation and the underlying litigation. I then reviewed the Spector recording of the tapes and what had transpired of which he was aware. I then indicated to him the meeting with Levy in October of 1974 and John's feeling that this might be a good television package or package to sell through television. Coury asked for a copy of the tape so that he could listen to it and that's why a copy was requested and sent to him.

"Q Did you mention Mr. Morris Levy's name or the fact that Mr. Levy or any of these companies had expressed an interest in promoting the album?

"A I indicated to -- I said I reviewed with him the October meeting with Morris, and I indicated that John's interestin selling this through television, as the

marketing medium, and the Morris Levy aspect, our discussions with Morris."

Does that refresh your recollection of what was said?

A Yes.

THE COURT: Read the last part of it.

Q The last answer was "I indicated to -- I said I reviewed with him the October meeting with Morris, and I indicated that John's interest in selling this through television as the marketing medium, and the Morris Levy aspect, our discussions with Morris"

THE COURT: Let us frame a question. You have a right to read his deposition, it is in. Now let's frame a question. It doesn't have to be so complicated.

Q My question is: At any time after January 9, when you first learned of the contents of the January 9th letter, either by telephone or after you got a copy of it, did it occur to you that you should bring Mr. Coury up to date on what was going on with Mr. Levy, that Mr. Levy was now claiming --

THE COURT: This is so complicated. Isn't the question simply, after you had read to you the Levy letter of January 9th, did you discuss that with Mr. Coury? Isn't that the question?

MR. SCHURTMAN: Yes.

THE COURT: I don't know why it has to be so complicated. Did you hear my question?

THE WITNESS: Yes, your Honor.

THE COURT: What is the answer?

THE WITNESS: No.

Q Did you discuss it with Mr. Menon.

A No.

Q Why not?

A Because I had -- I met with Mr. Lennon prior to receiving that letter and I met with Coury prior to receiving that letter.

THE COURT: The question was -- I don't know that it makes all that difference. The letter was read to you over the telephone by Mr. Dolgenos, right?

THE WITNESS: That is correct.

THE COURT: All right. Now, after it was read -- at any time did you -- I guess your answer is at no time after it was read did you specifically discuss it or give advice of it to Coury or Menon?

THE WITNESS: No, I didn't.

THE COURT: I think the question that Mr. Schurtman wants to put is why not? Can you answer that?

THE WITNESS: I just didn't. I didn't think

very much of the letter.

Q Did you tell either Mr. Coury or Mr. Menon --

A Menon or Lennon?

Q Menon -- at any time that in December, 1974 Mr. Levy had said that he didn't wantto sue Mr. Lennon?

A No. You've got to understand, I assumed that Levy was referring in Decekber to the Come Together settlement and not to anything else.

THE COURT: Proceed, please.

Q Was that your assumption in December?

A That's the only thing that came to mind.

Q You never asked him?

A No, I didn't.

Q All right.

A There would be no other basis for a lawsuit.

Q Mr. Seider, were you interested from a business standpoint in having Capitol put out the Lennon album on the retail basis?

A I'm not sure what you mean by business interest.

Q Well, you were Mr. Menon's advisor?

A That is correct.

Q Was it your view that it would be preferable from Mr. Lennon's standpoint to have Capitol handle the

album rather than Mr. Levy?

A It is not up to me, Mr. Schurtman. I don't give any thought to that.

Q You didn't give any thought to whether the album would be better off with Capitol than with Mr. Levy, is that what you are telling us,you never even thought about it?

A As a marketing medium?

Q Yes.

Q I take the same position as John. He wants his albums out. I don't get involved in that.

Q Is it your testimony that you would have been just as happy with the Levy package a having Capitol put out the album?

A If it is sold, if it was properly done with all approvals and satisfied John's requirements and things, and Capitol gave approval, EMI gave approval, why not? Especially with Mr. Levy testifying that it will sell millions within a year.

Q Mr. Seider, were you concerned that if you told Capitol that Mr. Levy claimed an actual contract that Capitol might decide not to touch this album, were you at all concerned about that?

A Could you just repeat the question back?

(Read.)

THE WITNESS: It didn't even enter into my mind. There was no contract.

Q At the January 14th meeting did the Capitol people say they would like to sell the album on a regular retail basis?

A They indicated they thought that selling the album in any way other than in the normal manner in which all of John's prior albums had been marketed would be detrimental to his carrier, it would antagonize dealers, it would not be smart for an artist of his stature.

Q Did they indicate any enthusiam for the album?

A They said they were quite excited about it. They liked the album.

Q And they wanted to put it out?

A Sure.

Q Did you at that point tell them that there would be a problem with John Lennon because John Lennon wanted to do a TV package with Mr. Levy?

A I said to them "You are going to have to convince John that this album should go out in the normal way. His desires, his inclination was to market this through television. He like the idea of television as a marketing medium" and I said "You are going to have to sell John on that, you don't sell me, sell John."

Q Did you express any preference as to how the album should go out?

A I don't recall. I am in business affairs and not in marketing, Mr. Schurtman.

Q During January were you still telling Mr. Levy that you might seek consent from EMI?

A I believe I told Levy about my conversation or my meeting with Coury, I told him after the meeting with Coury -- I said to him, I specifically remember this, I said to him that Coury had requested a tape and Levy said "That's bad."

I remember I spoke with Morris after the meeting with Menon and informed him that -- of Capitol's desire to persuade John that the best means of marketing this would be through the normal regular channels. I recall that at that time Morris said to me "Would it be of help if I called Mr. Menon?" And I said no. I said they were preparing a marketing program, that they would be coming in and meeting with John to discuss that marketing program.

Q Mr. Seider, isn't it a fact that you wanted Capitol to get the album and that you were concerned that Capitol might not be able to persuade Mr. Lennon to do it for them?

A I couldn't care --

THE COURT: Let me hear the question.

(Read.)

MR. PRETTYMAN: I object, your Honor, I don't understand the question.

MR. GRUMBACH: I don't understand the question.

THE COURT: I can hear it once more.

(Read.)

THE COURT: I guess -- do you understand the question?

THE WITNESS: Unless he's asking me, did I want Capitol to have the album.

Q Let us start off that way.

A Okay.

I didn't care who got the album. I just wanted the album -- the album was done, if it was one, I wanted it out to sell millions and millions of copy. Every juke box and every radio station would be playing that record.

Q Did you tell Mr. Levy prior to that meeting on January 30th that he definitely had no deal, or that he couldn't get it or that you couldn't get EMI's consent?

A I called him -- we had the meeting on the 28th. If I recall, it broke up very late at night. I remember calling Levy the next day, which was the 29th -- I believe that was a Wednesday -- in order to -- A, I told him

that Capitol had made the presentation. He had been aware of the presentation, because I had told him earlier that the Capitol people were coming in. I told him about the presentation and I said that John had agreed to go in the regular way as opposed to doing anything through television, and I wanted to meet with him, with Mr. Coury, to explain why Capitol would not allow --

(Continued on next page.)

am

Q I will get into that.

THE COURT: Let him finish, please.

A Why Capitol would not allow the album to come out and why they thought that anything other than the regular channels would be detrimental to John's career. That is why I asked Mr. Coury and that is when we set up the meeting for some time in the afternoon.

Q Let us fix a couple of dates again. I take it January 28 is the first time Mr. Lennon decided that he would let Capitol release the album through regular release rather than doing a television package?

A The Capitol people made a presentation and John was I guess persuaded by the Capitol presentation, the marketing program, the feelings of Coury that anything other than a regular means of distribution would not be good for him.

Q Mr. Seider, let me ask you this: Until Mr. Lennon made his decision on January 28th to let Capitol release the album were you trying to preserve the possibility of a deal with Mr. Levy in case Lennon decided not to go along with Capitol?

A I don't understand the question.

(Question read.)

A I was keeping Levy informed.

Q Is that your answer to my question?

A That is correct.

THE COURT: You referred to -- maybe this wasn't the exact word but the impression I got was that Capitol was coming back to New York to persuade Mr. Lennon of its ideas about marketing?

THE WITNESS: That is correct.

THE COURT: Do I gather from that that Mr. Lennon had the choice in the matter?

THE WITNESS: No, your Honor.

THE COURT: Why did Capitol have to come back and persuade?

THE WITNESS: The choice -- let us put it this way: I think a record company dealing with an artist of John Lennon's stature is not going to be unmindful of that artist's feelings and sensitivities as to how his albums are marketed and merchandised or exploited.

It is quite common that for record companies to get the feelings of the artist, to try to accommodate them to the extent possible and to be receptive, not to be insensitive. It is a very -- the record business, your Honor, while the records are pieces of vinyl, it is a very personal business between the artist and his company and any company tries to establish a relationship with their

artist and a relationship primarily where they are not insensitive to that artist's feeling by his product.

THE COURT: Okay. I am certainly understand that. But I am going to ask you if there was something perhaps a little beyond that here and let me ask you about Mr. Lennon's rights. I suppose he had a right not have the album released at all?

THE WITNESS: He could stay in the studio, your Honor, and keep on working in the album if he wanted.

THE COURT: In other words, the only way Capitol could get the album is if Mr. Lennon gave it to them?

THE WITNESS: That's correct.

THE COURT: But what you are saying is if Mr. Lennon releases an album to anybdoy Capitol was the one who either had to do it or give the consent?

THE WITNESS: That is correct.

Q I guess this is really hypothetical but let me just try it out, Mr. Seider, and see if you can help me, and maybe it isn't so hypothetical.

Was it your understanding at the time that if Mr. Lennon had said no to Capitol, I don't want to go your route, I want to go with Mr. Levy, was it your understanding

that there was any possibility of that occurring or did Mr. Lennon simply have no options?

THE WITNESS: I think there would have been a form of impasse. If Mr. Lennon sat on the tapes and didn't do anything nobody would get the tapes.

THE COURT: I am not talking about sitting on the tapes. I am talking about Mr. Lennon saying in response to the persuasion, Gentlemen, I am hearing what you say but I don't believe it would be good to go the retail normal route here and I want to go the TV route with Mr. Levy. Let us suppose that had been said, was it your understanding at the time that he could have done that or he had a chance to do it or what was in your thinking about this?

THE WITNESS: He could not have done that, your Honor.

THE COURT: And they would have simply said no?

THE WITNESS: They would have said no. There would have been an impasse, he may have sat on the tapes. He may not have given approvals vis-a-vis art work.

THE COURT: So the persuasion was simply to do this thing in a gentlemanly fashion but you are telling me you had no idea that Capitol would -- that Lennon could forde the issue and get Capitol with him?

THE WITNESS: He couldn't force the issue.

I would rather use the word override Capitol's decision. He couldn't override Capitol's decision with regard to that.

THE COURT: The thing never got to that impasse?

THE WITNESS: It never got to that impasse.

THE COURT: All right, Mr. Schurtman.

Q Could he have forced the issue in the sense of insisting on releasing the album to another company?

A I don't like using the word forcing the issue. I prefer the word he couldn't override the decision of Capitol.

Q Even after Mr. Lennon had decided to go with Capitol on January 28th, I should say release the album through Capitol, you still didn't tell Capitol about Mr. Levy's contract claim, did you?

A It never occurred to me. I didn't regard that letter, Mr. Schurtman.

Q Let us get to that meeting you had with Mr. Levy. When did you call Mr. Levy to set up the meeting?

A When Coury failed to show -- I had a meeting scheduled with Levy I think about 2 o'clock or 2:30.

Q On what date?

A The 29th, that was the Wednesday. Coury didn't show up. I waited in Lennon's office for Coury to

show up. He finally called me and said he couldn't make it because of the rains or something, he was stuck downtown.

Q Is that the day it was raining very heavily?

A I believe so, quite heavily. I called Morris back and I apologized for the fact that Coury couldn't make it and then we arranged that I would come over the next day and I believe it was about 3 o'clock, set for 3 o'clock the next day.

THE COURT: The 30th?

THE WITNESS: That is correct, the 30th.

Q You are quite certain these events occurred on two separate days?

A The Coury --

Q That the meeting was first scheduled for the 29th?

A That is correct.

Q That is the day it rained heavily?

A That is correct.

Q And then you didn't go over to Mr. Levy that same day?

A No.

Q You went over the next day?

A That is correct.

Q Was it raining the next day too?

A I don't recall. I remember I wore my raincoat

but I don't recall if it rained.

Q I am puzzled, Mr. Seider, because in your deposition, and let me read it to you --

THE COURT: That was a rescheduled meeting?

THE WITNESS: That is correct. By myself alone, he said I want to see you and we set it up for the next day because Coury couldn't come.

Q Let me read to you from page 253 of your deposition starting at line 6:

"A Coury said that he would be willing to attend a meeting with Morris Levy and I called Morris and spoke with Morris the next day. I remember it was rather early in the morning or at the beginning of the day. It was in New York. I said that --

"Q This is the 29th now?

"A It was Wednesday the next day. The 28th is on a Tuesday.

"MR. KANZER: Does somebody have a calendar?

"THE WITNESS: Yes.

"A And I --

"MR. BERGEN: The 29th is a Monday.

"A I told Morris that Capitol is preparing to put out the album in the normal way. He indicated he was very disappointed and that Coury was going to meet, was prepared

to meet and we set up a meeting for Thursday, the 30th, I believe, at 2 o'clock. I arranged to meet with Mr. Coury about 1:30 at John's office at 1370 Avenue of the Americas and Mr. Coury didn't show up.

"I called his office and he was downtown at a meeting and I put in a few calls to Mr. Coury and I think he called back. It must have been anywhere between 2:30, maybe between 2 and 2:30. I had advised Morris that Coury was not available or didn't seem to be, was late in his appointment and I would be late.

"And Coury called me from downtown saying that he was stuck in traffic. It was a very heavy rainstorm that day and that he would be unable to attend the meeting. He had a plane out of New York. He had to leave Manhattan and I believe by 4 o'clock. I believe he had a 5 o'clock plane or 6 o'clock plane. He had to be out of New York by 4 o'clock. I called Levy and explained that to him. He asked me if I would please come over. I said sure and I went to Levy's office."

Does that refresh your recollection, Mr. Seider, that you went to Levy's office the same day?

A No, I was confused. I am sorry, Mr. Schurtman. The sequence of events were as I related. We met with Coury on the evening of the 28th. We had a meeting

scheduled for the 29th. Coury went back to California on the 29th and I met with Levy on the 30th which is Thursday and because I remember the next day was Friday and then there was a very sad weekend.

Q So your deposition --

A I was in error on the deposition. It was the 30th. The meeting with Coury and Levy, the scheduled meeting was the 29th. Coury could not make it. He was downtown and he went back -- because I spoke with Coury on the 30th and he was in California.

MR. BERGEN: I was also in error on the deposition when I said January 29th was a Monday. It is a Wednesday.

THE COURT: All right. So we have got the 29th which was Wdnesday, the 30th was Thursday and the 31st was Friday.

THE WITNESS: That is correct, your Honor.

Q You have described the meeting that you had with Mr. Levy and then you said you were so stunned by what Mr. Levy was saying that you just sat there and looked out of the window, do you remember that?

A I was stunned. I just looked out the window because I didn't want to have too much conversation in that kind of environment.

Q Just as an aside, what kind of window was it that you looked out of?

A Mr. Schurtman, it was a window. I don't remember, Mr- Schurtman.

Q Would it surprise you if I told you that there is no window in Mr. Levy's office?

A It's my recoliection that there is a window there.

Q I see.

Did you ever learn why Coury hadn't kept the appointment with Levy?

A I don't know. I think I may have asked him afterwards and he said he was told not to go.

Q Who told him not to go?

A I don't know. I didn't pursue it, Mr. Schurtman.

Q Isn't it a fact that Mr. Menon told Mr. Coury not to attend the meeting?

A How do I know?

Q Nobody ever told you?

A I didn't pursue it.

Q After Mr. Levy had told you that he was planning to put out the album did you meet with some lawyers?

A Yes, I did.

Q With whom did you meet?

A I recall meeting with Mr. Granite, Saul Granite, I believe on Friday the 31st very late in the evening. When I say very late in the evening, towards the end of the business day. I believe I had been at the Marshall, Bratter office early in the day.

Are you talking about the next day, the 31st?

Q Yes.

A Yes.

Q Did you tell him about Mr. Levy's letter of January 9?

A I don't believe I did.

Q You still didn't think it was significant?

A No. I didn't remember it.

Q Did you meet with Mr. Menon shortly after - wards?

A I met with Mr. Menon some time in February. I don't know the date. I know I was in New York for about another week and I went back to California, I think about the 8th or the 10th of February and I met with Mr. Menon some time after those dates.

Q Did you suggest to Mr. Menon in words or substance that it might be a good idea for him or Mr. Coury to meet with Mr. Levy to avoid possible litigation?

A I don't recall that.

Q Did you anticipate litigation at that point?

A I anticipated litigation when Levy turned to me and said, "I have been had, I am coming out with the album". He is no stranger to litigation.

Q Did you tell any of the Capitol people or any of the lawyers at that point that the first part of the Come Together settlement was still unfulfilled?

A I don't recall discussing it.

Q Did you give any written statements or affi- davits or memos to anyone concerning this situation?

A I don't recall. I don't believe I did.

Q You did tell Mr. Levy at the meeting on the

30th that somebody would seek an injunction against him?

A I am sure I said that Capitol would probably go for an injunction.

Q Was an injunction discussed at your subsequent meetings?

A We had discussions -- there were discussions about what kind of relief to seek. YOu explore all the possibilities.

Q Did some people suggest that an injunction be sought?

A There were advocates of an injunction.

Q Who were the advocates of the injunction?

A I just don't remember it. It was a very confused time, Mr. Schurtman, in terms of who was saying what, a kind of frantic activity when people are trying to ascertain what the devil took place.

Q You told them what took place, didn't you?

A Yes, I did.

Q In full detail?

A Also other people were telling them other things perhaps. I don't know. In my mind it was rather a confusing picture. People were trying to get facts down.

Q Did somebody say it would be inadvisable to

seek an injunction because you might not be able to prove your case?

A I don't know. I am sure, as most lawyers are, they always look at the downside aspect of a case.

Q Can you remember anything else specific about that?

A No, I really don't.

Q Let me read you --

A I then became a confused individual.

Q Your deposition was taken on June 30, 1975 and let me tell you what your recollection was at that time starting at page 271, and we are talking about a meeting now at which you and various lawyers were present:

"Q Was there any discussion about seeking to enjoin Mr. Levy from bringing out his album either at that meeting or at the meeting you had just had with Granite and Gold?

"A There was a discussion about seeking injunctive relief.

"Q And what was said?

"A I think that the conclusion was that the best thing would be to put out the album, the authorized album by Capitol or rather by Apple.

"Q Did anybody urge seeking injunctive

relief?

"A Yes, people -- it was urged -- I don't recall specifically.

"Q By whom?

"A I think the Capitol people. Mr. Granite possibly may have suggested going for injunctive relief. I thought that might be an appropriate remedy.

"Q Were there any reasons for not seeeking injunctive relief?

"A I think there may have been some disagreement in so far as the tactics were concerned on let's call it the Lennon camp and the Capitol camp.

"Q What was the position of the Lennon camp?

"A That this was a fight primarily of Capitol and EMI, that they owned the recordings and always owned and if they thought to prevent or stop somebody from interfering or exploiting records that they owned they should be the one to lead the fight and the people at Capitol thought that there might conceivably be issues of fact to which on the motion for injunctive relief might prohibit the granting of a temporary injunction.

Although I believe there was a belief after the facts were related to the people at Capitol and EMI that they would prevail in the end but that the need, if they were going to go for injunctive relief, would be to make sure that they were going to win at the preliminary stage. The people at Capitol felt or Mr. Granite felt, he urged most strongly in this regard that the best area of approach would be injunctive relief on the basis of name and likeness."

Does that accurately set forth what occurred?

MR. BERGEN: Can you read the rest of his answer, Mr. Schurtman?

THE COURT: I don't think that it is a very weighty matter to go into the intricacies of the lawyer discussions as to what remedy to take. There are lot of factors to consider and so what?

Q My next question was going to be what facts were discussed which someone felt --

MR. PRETTYMAN: I object to that. If we are going to go into this we should do it fairly and have the entire sequence read and so forth.

As your Honor says, I think it's irrelevant.

THE COURT: I really think --

I don't know whether there is a technical thing of privilege. Maybe the privilege thing has been waived here. I don't want to blot out a big portion of proof but of all the things we have to worry about when lawyers get together and try to explore the facts and decide what remedies to take, that is a story all its own and I am not sure it bears too well on the litigation or the facts we are trying to determine here. I would like to adjourn a minute and see counsel in the robing room for just a few minutes.

(Luncheon recess.)

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AFTERNOON SESSION

(2.45 p.m.)

H A R O L D S E I D E R , resumed the stand, having been previously duly sworn, testified further as follows:

THE COURT: I discussed off the record with counsel during the lunch hour, among other things, the scheduling, and I understand that we will do all we can this afternoon to finish up the proof, but I told the lawyers that I would appreciate a little more extensive oral argument than I had originally suggested, and I think everybody is agreeable to that.

So what I would like to do is to come to an agreement on the time for that. My present suggestion would be three o'clock next Thursday, February 5.

I think that if we devoted the rest -- beginning on that day, if it is good, we can wind it up.

How is that?

MR. SCHURTMAN: Fine.

MR. PRETTYMAN: I don't have my calendar, which is in Washington, but I assume it will be all right.

MR. GRUMBACH: Fine, your Honor.

THE COURT: If you have a real difficulty let me know.

MR. SCHURTMAN: 3 p.m., your Honor?

THE COURT: Yes. That would be in this room and we will proceed on that basis.

ME. GRUMBACH: Fine, your Honor.

THE COURT: In an unusual display of confidence, the lawyers have admonished me time and time again to read the briefs, and I will assure that something along that line will be done.

Proceed

MR. SCHURTMAN: Your Honor, may we respond to the briefs that were served upon us today?

THE COURT: You have to get that in early in the week. The only reason for having the argument is to have all the materials in hand and have them worked over.

MR. SCHURTMAN: We will give them to you by the close of business on Tuesday.

THE COURT: Reply to what?

MR. SCHURTMAN: To the various briefs that were served on us today. One of them was a reply brief; that we won't respond to.

THE COURT: Any brief other than a reply brief you want to either reply or answer, right?

MR. SCHURTMAN: Yes.

THE COURT: Make it short and have it by the end

of the day Tuesday. Let's finish up with Mr. Seider.

CROSS EXAMINATION (Continued)

BY MR. SCHURTMAN:

Q Mr. Seider, I am still not entirely clear from your testimony this morning, did you on October 8 tell Mr. Levy that you also needed Capitol's consent?

A Again, I had spoken about Capitol. I don't know if I used words like that, but I had spoken about Capitol and said that Capitol -- although Capitol distributed the records on the Apple label in the United States, you needed the consent of EMI, because they were the owners of all of John's recording rights throughout the whole world.

Q When you told Mr. Levy time and again that EMI's consent was necessary and that at some point you would try to get EMI's consent, was it your intention to make a good faith effort to seek EMI's consent?

A Yes.

Q Was it your intention to make a good faith effort to seek Capitol's consent?

A Assuming that I had gotten the consent of EMI, I would then go to Capitol.

Q The first time you really ever discussed the consent question with anyone, either at Capitol or at EMI,

was when you met with Mr. Menon, wasn't that so?

A I called EMI shortly after my meeting with Levy in November and I tried to get Len Wood and I didn't get him and then I called back, I believe, and I got Malcolm Brown; then at some point I spoke to Len Wood. And the answer is, I spoke to them about -- I told them that I want -- Len Wood, I said that I wanted to talk to him about marketing John's next album, about the marketing of John's next album.

THE COURT: Let me interrupt. To some extent the questions are simply a repetition of his direct testimony. I don't think it is anybody's fault, but maybe we can at this point avoid that.

You focus on it,and if his answer simply repeats the direct, let's not do that.

MR. SCHURTMAN: Yes, your Honor.

BY MR. SCHURTMAN:

Q Am I correct that when you met with Mr. Menon in January, January 14, that was really the first time you had a face-to-face discussion with anyone, either at EMI or Capitol --

A Other than my meeting with Coury.

Q -- about the possibility of getting --

A Face-to-face.

Q -- about the possibility of getting at least Capitol's consent; isn't that so?

A I was referred, as a result of Rupert Perry, to discuss U. S. marketing with the Capitol people.

Q When you spoke to Mr. Menon on January 14, did you tell him that you thought the Levy package was a good idea and that you would like to get Capitol's consent and that you would like to get FMI's consent?

A There was No discussion of the package. We were discussing the Oldies item, not the Levy package.

Q Let me read to you from Mr. Nenon's deposition. This is on page 154 of Mr. Menon's deposition, taken on May 28, 1975, and he is talking about the January 14 meeting.

"Q What did Mr. Seider say to you with respect to Mr. Levy or any company with which Mr. Levy was affiliated?"

This is the answer by Mr. Menon:

"A I believe Mr. Seider said that Mr. Levy had expressed an interest in TV direct mail package campaign on this album, on this Rock and Roll album, and Mr. Seider, I think, said that he had made it clear to Mr. Levy that any such proposal would require the consent of FMI and

Capitol, and I think he said to me in passing that he didn't believe -- I think he said that he didn't believe I would have an inte4est in such a proposal, and I immediately confirmed to him that I would have none."

Did that refresh your recollection that you did discuss the possibility of a Capitol consent with Mr. Menon?

A I was up there, Mr. Schurtman. I was up there to inquire as to Capitol's consent.

Q So the question of the consent did come up in that discussion?

THE COURT: What discussion? Are you talking about his discussion with Menon or his discussion with Levy.

MR. SCHURTMAN: His discussion with Menon.

THE COURT: I don't know where we are.

MR. SCHURTMAN: We are heading --

THE COURT: I don't know what the issue is. I thought that it was clear that he was discussing with Menon -- that was the subject, wasn't it?

MR. SCHURTMAN: He testified a few minutes ago, unless my memory is completely off --

THE COURT: He said he didn't remember using the phrase "TV package" with Menon.

Isn't that what you said you did not do?

THE WITNESS: A Levy TV package, and I think -- as I understood his question, I thought he was referring to the October 8th meeting at one point.

THE COURT: I think we are a little off the subject.

Go back. I don't quite understand.

MR. SCHURTMAN: Would you like to have the reporter read back?

THE COURT: Start your questions again. I don't know where we are.

(Continued on next page.)

pm

BY MR. SCHURTMAN:

Q Mr. Seider, let's go back to the January 14th meeting.

You testified a few moments ago that this was the first face-to-face occasion that you had to talk to Capitol about getting their consent for a Levy TV package.

A Mr. Schurtman, I said in response to the question similar to that that I had met with Coury.

Q Had you discussed --

A I didn't refer to it ever as a Levy TV package. It was my first face-to-face meeting with Capitol with regard to the marketing of this oldies album that John was recording.

THE COURT: Where we stand is he has taken issue with your reference to "Levy TV package." Let's go on from there.

Q Suppose we call it a TV direct mail package in which Mr. Levy had an interest.

A I am sorry, I don't mean to quibble with you --

MR. BERGEN: I don't see why we have to call it anything, your Honor; objection.

THE COURT: I don't either.

MR. SCHURTMAN: All right, your Honor.

Q On January 14th did you speak to Mr. Menon

about Mr. Levy?

A Levy's name was mentioned.

Q In what context was Levy's name mentioned?

A The context of the fact that John had indicated or desired or expressed a desire to market this album through TV on TV and that we had met with Levy some time in Octobr, or -- I don't know if I mentioned the date -- and that Levy wanted to do the marketing of that album.

Q Did you tell Mr. Menon that you had told Levy at the October 8th meeting, or whenever, that the consent of EMI and Capitol was needed?

A I don't recall --

MR. BERGEN: I don't think he has testified to that.

MR. SCHURTMAN: I am asking him.

THE COURT: This is all right.

A I don't recall. I don't recall.

Q Did you ask Mr. Menon to give Capitol's consent to a TV package to be produced with Mr. Levy?

A I don't know if we ever got that far. Mr. Menon immediately went into a discussion about -- the people who were attending that meeting went into a discussion about how they thought that this would not be a good idea for John.

THE COURT: Can I have the last question and

answer.

(Read.)

Q Isn't it a fact that at that meeting instead of asking Mr. Menon for his consent you told him that you didn't think he'd be interested in giving any such consent?

A Well, again I don't recall, I just don't recall.

Q That is why I wanted you to listen to Mr. Menon's testimony to see if it refreshes --

A I would think, Mr. Schurtman, if we got into a discussion about TV merchandising and Menon said that it was not a good idea, that he would frown upon it, that it would be antagonistic, one would gather if you asked the outright question you know what the answer is going to be.

MR. SCHURTMAN: Your Honor, now that we have it in context may I read to the witness once more what Mr. Menon said so Ican ask him about it.

THE COURT: Yes.

Q Mr. Menon testified at page 154:

"Q What did Mr. Seider say to you with respect to Mr. Levy or any company with which Mr. Levy was affiliated?

"A I believe Mr. Seider said that Mr. Levy had expressed an interest in TV direct mail package campaign on this album, on this rock and roll album, and Mr. Seider,

I think, said that he had made it clear to Mr. Levy that any such proposal would require the consent of EMI and Capitol and I think he said to me in passing that he didn't believe -- I think he said that he didn't believe I would have interest in such a proposal, and I immediately confirmed to him that I would have none.

"Q I wan't clear on that. Do you say Mr. Seider said to you that Mr. Seider didn't think you would be interested or did Mr. Seider say that he told Mr. Levy that he didn't think you would be interested?

"A No, I believe he said to me that 'I don't believe you would be interested in anything like that' which I immediately confirmed, that I wouldn't, which he fully understood."

Now, Mr. Seider, my question to you is, did you start out by saying to Mr. Menon that Capitol wouldn't be interested in the package, at which point he confirmed it, or was it the other way around?

A I don't know what the other way around is, but I don't recall it taking place the way you suggested before, that I said, hello bastard, you are not interested in a TV package.

Q All right.

Getting backto the period after January 30th,

you know that certain telegrams were sent by Capitol to suppliers and TV stations with which Adam VIII had dealings in the Roots album, you have seen those, haven't you?

A I'm not sure. If they are attached to the complaint I have seen them. I didn't see them before. I know them as a result of this testimony.

Q Were you aware that they were sent out?

A I don't believe so.

Q Do you know who suggested that such telegrams be sent?

A No, I don't recall.

Q Were you consulted on that matter?

A I don't believe I was.

Q Did you think, after January 30th, that the Come Together settlement was still in effect? Or did you think it had been abbroagated?

MR GRUMBACH: By whom?

MR. BERGEN: Objection.

THE COURT: I will overrule the objection.

A I thought it was still in effect.

MR. SCHURTMAN: No further questions.

THE COURT: I guess it is your turn, Mr. Prettyman.

CROSS EXAMINATION

BY MR. PRETTYMAN:

Q Just to make it absolutely clear, Mr. Seider, when you spoke to Len Wood, you first tried to reach him and couldn't and then I think you spoke to him briefly.

A That is correct.

Q I want the record to be absolutely clear that you didn't mention to him Mr. Levy or any of his companies or any proposition that he had or anything to do with Mr. Levy.

A No, I --

MR. SCHURTMAN: Your Honor, speaking of leading questions.

MR. PRETTYMAN: You are quite right.

Let me start over.

Q When you spoke with Mr. Wood, when you finally reached him, did you in fact mention Mr. Levy or his companies or anything having to do with the proposition which he had in mind?

A No.

THE COURT: Let me get the last question and answer.

(Read.)

THE COURT: Go ahead.

Q By October 8th, by the October 8th meeting, were you generally aware of the recording costs already incurred by Capitol in connection with the Spector tapes?

A I was aware of the costs generally which had been incurred up to about that date.

Q And who was the source of your information?

A I had gotten that information from people at Capitol. Generally I would get my information from Vaughn in Burdick, who is the -- I believe he is the contract administrator at Capitol and he generally oversees the recording costs at Capitol.

Q Do you know of any instance in which Mr. Lennon has ever produced, personally produced, one of his albums being made from a 7-1/2 inch tape?

A I don't, no.

Q A question was asked you, sir, about whether you ever asked for the return of the 7-1/2 inch tape that had been given to Mr. Levy. If you had made such a request do you have any idea how difficult it would have been for someone to make a copy of a 7-1/2 inch tape before returning it?

MR. SCHURTMAN: Objection.

THE COURT: I will overrule the objection. Go ahead.

A My knowledge is that you can make copies from a 7-1/2 inch tape.

Q Readily?

A Yes.

Q You said there would have been an impasse if Mr. Lennon had decided not to let Capitol have the album. In theory at least would that impasse have been broken if EMI, Capitol and Apple, had all agreed to let Mr. Levy have the album for mail order?

A You would need the consent -- at some point all three of those people or parties that you mentioned would have to join in. Apple would probably join in vis-a-vis the receiver until the settlement was completed.

Q My only point was that if the three did agree then the impasse could have been broken and Mr. Levy

could have received his album?

A Yes, any legal documentation would probaby have had all three parties to any document.

Q Sir, were you asked at each meeting that you attended with any representative of Capitol after Capitol became aware of Mr. Levy's intention whether you and Mr. Lennon had in fact ever given permission to Mr. Levy to put out this album?

A Generally, yes. The Capitol lawyers and the Capitol people were always askeddid we give any consent to Levy.

Q Did Mr. Menon ask you that?

A I believe he did. I had a meeting with him sometime in mid February.

Q Did the lawyers and/or Mr. Menon ask you the circumstances leading up to this situation that they found themselves in?

A I seem to recall that I related the incidents to Capitol representatives in New York and also to EMI representatives in New York and to Mr. Lennon and a few of the Capitol people in California.

Q Did you in each instance give unqualified assurance that you had never given permission to Mr. Levy to put out the package?

A Unqualified and emphatic.

Q Were the same assurances made on behalf of Mr. Lennon?

A Again speaking for myself I know that I gave it to Mr. Menon in California when I met with him and his people. I believe Mr. Lennon and myself met with representatives of EMI and Capitol in New York and Mr. Lennon -- I was present and Mr. Lennon gave the same assurances.

Q Unqualified?

A Unqualified.

Q In the negotiations leading up to the 1969 contract between Apple and Capitol were you aware of a memorandum signed by Mr. Gortikov and Mr. Klein dated August 8, 1969?

A Yes.

Q I believe that is Defendants' 0000.

THE COURT: Is that the memo of understanding?

MR. PRETTYMAN: That was the memo of understanding.

I will hand him a copy.

THE COURT: Sure.

Q Did that help confirm your view in regard -- I will put the question in a different way.

Did that help you in any way in terms of your

view about mail order as opposed to club rights?

MR. SCHURTMAN: As of when?

MR. PRETTYMAN: As of the time that the agreement was signed.

THE COURT: Let us hear the question.

(Question read.)

Q This memo speaks of club rights, does it not?

A This memo became the basis and it was the draft agreement submitted and worked upon matched against this particular memo.

Q Does the memo speak in terms of mail order at all?

A No, because the mail order and club are the same thing.

Q Were you generally aware of Capitol Records artists' contracts during the period '67 through '71? Did you ever see one?

A Yes.

MR. PRETTYMAN: I would like these three marked.

THE COURT: Is there a copy of 0000 that I can have marked?

MR. PRETTYMAN: Yes, your Honor.

(Defendants' Exhibits CP-1, 2 and 3 were

marked for identification.)

Q I show you these three forms and they have handwritten dates, effective dates down in the corner Mr. Seider, and ask you if these look like the artists' contracts that you were familiar with during that period of time?

A This looks like the Capitol contracts.

Q Let me draw your particular attention to --

MR. SCHURTMAN: Are you just asking him to identify something?

MR. PRETTYMAN: Let me show them to you first.

MR. SCHURTMAN: Are you going to offer these?

MR. PRETTYMAN: Yes.

VOIR DIRE EXAMINATION

BY MR. SCHURTMAN:

Q I believe you testified that you worked for United Artists, is that correct?

A That is correct.

Q Why were you familiar with these Capitol forms?

A You mean today?

Q You have just been shown some Capitol forms and you looked at the 1967 date, the 1968 date and the

1971 date and you said you are familiar with them.

A I am familiar with the form. I don't think that Mr. Prettyman asked me about any specific date.

Q Yes, he did. He pointed to the date in the lower right-hand corner.

A I am sorry.

Q You are not familiar with them?

A I am familiar with the Capitol form of contract because -- I am sorry, are you talking about today?

Q I am talking about the date that Mr. Prettyman pointed to in the lower right-hand corner, 9-25-67.

A In '67 I was not familiar with that form of contract at that date.

Q How about 8-29-68?

A I am not sure. I may have picked up a form along the way.

Q And 11-3-71?

A '71 I was familiar with the contract form.

MR. PRETTYMAN: Why don't I jut offer '71 then?

MR SCHURTMAN: I think '67 and'68 the witness is not familiar with. On the'71 form how do you know this is the form that you were familiar with?

THE COURT: What difference does it make? Is there any dispute that these are Capitol forms?

MR. PRETTYMAN: They are all printed forms.

THE COURT: As far as introducing them into evidence if they are what they purport to be and if they have some relevance to the case they get in.

I assume that a Capitol witness could walk in here very quickly and testify that these are the Capitol forms, probably a Capitol lawyer could testify to that. As far as this witness' knowledge of things that is different.

MR. SCHURTMAN: For what purpose do you want to offer them?

MR. PRETTYMAN: I want to offer them because of a provision on the last page where I have put an arrow. Can I read it or do you want me not to read it since it isn't in yet?

THE COURT: You are talking about the interpretation of this mail order club?

MR. PRETTYMAN: Sure.

THE COURT: You say it relates to that?

MR. PRETTYMAN: Yes, sir.

THE COURT: Mr. Schurtman, do you contest the authenticity of these things?

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MR. SCHURTMAN: I don't even know what they are, where they came from. Mr. Prettyman represents to me these are the only forms used by Capitol or were different types of forms used for different situations?

MR. PRETTYMAN: All I am saying is that at this particular point in time in 1971 there was a contract in use at Capitol which was an artists' contract, a form which it filled out with some of its artists. It may have had other contracts that had other things in them but this was in effect.

MR. SCHURTMAN: The other contracts may have had other definitions. I don't know what this proves.

MR. PRETTYMAN: They may have.

THE COURT: It is not the whole case but as a piece of the case it seems to me that we have this issue about whether sometimes or lots of times or what mail order rights have been used synonymously with club rights. Probably there are lots of different contracts that cover different situations but this is a piece of information -- I must say to save time I would take this for what it is worth. It is an authentic document, unless you question the authenticity of these. If these are fakes, we don't want them in.

MR. SCHURTMAN: I am not suggesting for one

moment that they were forged for purposes of this case.

THE COURT: Of course not.

I will receive them.

MR. SCHU[illegible]MAN: All of them?

THE COURT: Yes. I don't think there is a question about the authenticity.

MR. SCHURTMAN: I object to the relevance and the probative value.

THE COURT: Overruled.

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T2B pm

jqs Seider - cross

BY MR. PRETTYMAN:

Q I call your particular attention in each contract to a Paragraph F-12 on the last page of each --

THE COURT: Is there anything he has to testify about?

MR. PRETTYMAN: I want to show if he is familiar with this language, one sentence.

THE COURT: What exhibit is that?

MR. PRETTYMAN: CP-1.

THE COURT: What date is that?

MR. PRETTYMAN: 11/3/71. The same provision is in each of these, your Honor, and the other two dates are 8/29?68 and 9/25/67.

THE COURT: Okay.

Q The language is "The words 'club distribution plan' mean distribution by mail order direct to consumers".

Were you generally familiar with that language, sir?

A I was aware of it.

MR. PRETTYMAN: I believe these have been received, your Honor.

THE COURT: Yes, they have.

Q You were asked about the Two Virgins album.

MR. PRETTYMAN: Your Honor, I have two docu-

ments here that I don't believe I need to question Mr. Seider on. Mr. Levy was questioned about the Two Virgin albums and --

THE COURT: You mean Mr. Lennon?

MR. PRETTYMAN: Mr. Levy I gave the Two Virgins album as an example which showed him something or other.

THE COURT: Yes.

MR. PRETTYMAN: I had marked only at that time Defendant Exhibit CK which was an EMI permission to another company to put that album out and I now also have -- I was incorrect in saying that Capital itself had not given permission although it wasn't necessary prior to 1969 because in fact Capitol did give permission and I would like this contract marked as the next exhibit. I am sorry, Defendant Exhibit BS for identification and I would like to show those to opposing counsel.

THE COURT: CK is the EMI?

MR. PRETTYMAN: CK is the EMI release and BS is the Capitol release.

THE COURT: Okay. And you are offering both, is that right?

MR. PRETTYMAN: Yes, sir.

Those are all the questions I am going to have of Mr. Seider.

MR. SCHURTMAN: No objection.

THE COURT: We will receive BS and CK.

MR. PRETTYMAN: May I substitute a copy for CK since it was signed?

THE COURT: Yes.

Mr. Grumbach, do you have any questions?

CROSS EXAMINATION

BY MR. GRUMBACH:

Q Mr. Seider, you were asked yesterday questions with r ation to a document known as or called a master license dated April 9, 1973 between United Artists Record and Suellyn Productions, Incorporated. I think one question had to do w n the language in Subparagraph II of Paragraph 2-B which says:

"Through direct mail and/or mail order in accordance with merchandising methods known and understood in the mail order business as 'subscriptions' or 'club plan' methods."

Will you explain to me what that language means to you?

A That mail order and club plan are the same thing.

Q Let me just ask you a couple of questions about tetms of licensing contracts.

Are the terms of clauses dealing with auditing rights boilerplate or are they subject to negotiation?

A They vary. They are subject to negotiation.

Q Are the terms with respect to when royalty payments are made boilerplate or are they subject to negotiation?

A They are subject to negotiation.

Q How frequently are royalty payments made under the Apple-Capitol agreement?

A I believe the payment from Capitol to Apple in connection with sales of Apple records is on a monthly basis. I believe 45 days after the end of each month.

Q Are terms with respect to the artist or record company's approval of cover material boilerplate or are they subject to negotiation?

A Negotiation.

Q Are terms with respect to promotional material boilerplate or subject to negotiation?

Are terms in a license contract with respect to the artist or the record company's rights to approve commercials and promotional material boilerplate or are they subject to negotiation?

A It could be subject to negotiation.

Q Are rights of an artist or a record company

to approve test pressings of the actual record boilerplate or subject to negotiation?

A They are negotiable terms.

Q Are the terms of sell-off rights for inventory manufactured before the expiration of the license boilerplate or subject to negotiation?

A Subject to negotiation.

Q Are terms in the contract which might terminate the agreement in the event of the licensee's bankruptcy or insolvency boilerplate or subject to negotiation?

A They are subject to negotiation.

Q Are provisions as to the return or destruction of masters and master releases at the expiration of the license term boilerplate or subject to negotiation?

A They are also subject to negotiation.

Q I show you Defendant Exhibit AS which are answers to interrogatories sworn to by Morris Levy on September 11, 1975 and I refer to answer No. 22 in which the question was asked to identify any persons whom the plaintiffs or Mr. Levy contend acted or communicated on behalf of or purported to bind or otherwise represented Apple in any dealings that you contend Apple had with Big Seven or Adam VIII or Morris Levy between September 1, 1973 and February 19, 1975, and I point out to you that

for that entire period the only individual identified is John Lennon.

Mr. Seider, did you at any time understand that in your relationships or convey in your dealings with Mr. Levy or Mr. Kahl that you in any way represented Apple Records, Inc.?

A No.

MR. SCHURTMAN: This was such a long question I lost it in the middle.

May I have it read back, please?

THE COURT: You have the answer to interrogatory. Just show him that.

I don't even think that was necessary to the question. The guts of the question was did he represent somebody.

(Question read.)

MR. SCHURTMAN: All right.

MR. PRETTYMAN: I have no further questions.

MR. BERGEN: I have no questions.

THE COURT: What area are you going to examine on? Whether things are boilerplate?

CROSS EXAMINATION

BY MR. SCHURTMAN:

Q Is it your contention that an agreement which

does not contain all of the provisions that Mr. Grumbach listed for you and I mean auditing, payment terms, commercials, test pressing, sell-off rights, bankruptcy clauses, return of destruction of masters -- I think I have them all down -- that an agreement which does not contain clauses pertaining to all these points is an unenforceable agreement?

A No.

Q It's something that may or may not be in the agreement, right?

A You negotiate.

MR. SCHURTMAN: Okay.

THE COURT: Thank you, Mr. Seider.

What else do we have?

(Continued on next page.)

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MR. SCHURTMAN: Shall I proceed, your Honor?

THE COURT: Yes, what do you have? Are you going to introduce some depositions or what?

MR. SCHURTMAN: It is mostly a question of exhibits and statements.

What shall we do with the Chapman deposition? Shall we read it?

THE COURT: You can introduce it and I will have time to read it over the weekend.

MR. SCHURTMAN: It is not a deposition, Mr. Levy keeps reminding me.

THE COURT: Let's get it marked as an exhibit, please.

MR. SCHURTMAN: Fine.

Your Honor, may I have this deemed marked and then we will furnish a copy of it. This is my annotated copy of the trial transcript.

THE COURT: What is the next number?

MR. SCHURTMAN: 100.

THE COURT: Just get it to my office. It is very short, get it there Monday morning. Couldn't you do that?

MR. GRUMBACH: I understand this will include all the cross-examination?

MR. SCHURTMAN: Absolutely. Let me designate the pages. It will be page 3 of the trial before Judge MacMahon.

THE COURT: I have got that. Just a moment.

MR. SCHURTMAN: Through page 10.

Do you have the original, your Honor?

THE COURT: I do.

MR. SCHURTMAN: Then, may we mark your copy.

I am marking pages 3 to 10 of the trial transcript before Judge MacMahon as Plaintiffs' Exhibit 100.

I offer it in evidence.

MR. PRETTYMAN: Your Honor, you may recall we said we would have no objection to the introduction of this so long as we could call one brief passage in Mr. Kahl's deposition to your attention in connection with it.

MR. SCHURTMAN: This is argument, your Honor.

MR. PRETTYMAN: We said earlier we would have no objection if we could do this one thing.

THE COURT: Just to save time they would have to submit a memo, and I will receive Exhibit 100.

(Plaintiffs' Exhibit 100 was received in evidence.)

THE COURT: What is the passage?

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MR. PRETTYMAN: The passage is on page 1415 of Mr. Kahl's testimony in this case, your Honor.

THE COURT: What volume, what date?

MR. PRETTYMAN: It is the 26th.

MR. SCHURTMAN: This is his testimony in this case?

MR. PRETTYMAN: Yes.

THE COURT: Look, it is argument, but it may save a little time.

Go ahead.

MR. PRETTYMAN: It is just lines 2 through 17. The point of it is that --

THE COURT: Okay.

MR. SCHURTMAN: As long as we are arguing, let me say that there is no inconsistency between that passage and the Chapman testimony.

THE COURT: All right, I will certainly look at all of that.

MR. SCHURTMAN: Both events could have taken place.

MR. BERGEN: Except Mr. Chapman said that Mr. Lennon told him.

THE COURT: All right, I will look at all of that.

What is next?

MR. SCHURTMAN: Don't you think Mr. Chapman could have spoken to two people?

The next thing, your Honor, I would like to offer as Plaintiff's Exhibit 101 the official airline guide, North American Edition, dated October 1, 1974, and I call your Honor's attention --

THE COURT: Let me see if I can guess.

When did Bernard Brown come from Los Angeles to New York?

MR. BERGEN: That is right, your Honor.

MR. SCHURTMAN: I agree, your Honor. You win the first prize.

Let me call your attention particularly to -- we have marked it with a paper clip -- but it is pages 524 to 525.

THE COURT: Any objection?

MR. BERGEN: No objection.

MR. PRETTYMAN: No objection, your Honor.

THE COURT: Exhibit 101 is received.

(Plaintiff's Exhibit 101 was received in evidence.)

MR. SCHURTMAN: Your Honor, for the record I would like to state that we had intended to call Mr. Lewis

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Garlick for two purposes.

One, to testify as to certain conversations he had with Mr. Lennon and, secondly, for the purpose of testifying as to why his company stopped printing covers for the Roots album.

Mr. Garlick's deposition was taken. I have discussed the matter with Mr. Prettyman. In order to get in the few lines of testimony, it would require reading in a great deal of additional testimony. If your Honor thinks it is necessary, we will call Mr. Garlick as a live witness, but at this time I am prepared not to call him.

MR. PRETTYMAN: Wait just a minute, let's get the record straight here.

You said that you were going to call Mr. Garlick as a witness and I then agreed, the defendants agreed, thatif you wished to place his deposition in evidence in place of calling him, we would agree to your doing that.

I have no objection to Mr. Garlick turning up as a live witness. I have no objection to your putting in his deposition in place of that, but I don't want the record to reflect that somehow plaintiffs were not offered the opportunity to do either because, as far as we are concerned, they can do either one.

MR. SCHURTMAN: No, I simply --

THE COURT: Okay, that's clear.

What is your proposal? You want to read a little of the deposition?

MR. SCHURTMAN: No.

THE COURT: As far as what the Court wants, don't turn it over to me. I will leave it strictly with the attorneys.

MR. SCHURTMAN: Your Honor, as I pointed out, we have at least another 20 witnesses we could call on various aspects of the case. During discussions it was agreed that Much of their testimony would be cumulative, both on direct and cross, and in order to cut down the number of witnesses we decided not to call additional witnesses, but I don't want any inferences to be drawn against the plaintiff because we haven't called certain witnesses.

THE COURT: That is fair enough. None will be drawn.

MR. SCHURTMAN: The same is true of other people who were at the farm, including Mrs. Winifred Kahl and Miss Maureen O'Connell.

Again, we would be prepared to call them to testify as to what went on at the farm.

Similarly, or the reasons that we discussed,

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I believe yesterday, we will not call any more record industry executives at this tme to testify as to custom and practice with respect to making oral agreements, which are followed by either partial or complete performance and which are thereafter followed by written agreements.

I believe your Honor indicated you have heard enough testimony on that point.

THE COURT: I think so.

MR. SCHURTMAN: And we will dispense with further witnesses.

We were also prepared to call the president of another large mail order house, Ronco, who would have testified --

MR. PRETTYMAN: Objection, your Honor. This isn't an offer of proof of what he would be allowed to say if he had called him and I object to this going into the record. He can state, generally, that he would have called a witness to testify about a general subject matter. I have no problem with that.

MR. SCHURTMAN: That iw what I was going to do.

Who would have testified as to the following areas: -- will that satisfy you?

MR. PRETTYMAN: I don't know, I don't know what

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you are going to say.

MR. SCHURTMAN: Listen to what I say and then object.

MR. PRETTYMAN: That isn't what you were saying before.

MR. SCHURTMAN: Who would testify to the subject of mail order sales without retail fulfillment centers and who would testify as to the length of time of a TV mail order campaign.

Again, since his testimony --

THE COURT: I think the reason you are making this record is to prevent inferences from being drawn against you and I don't take it for any other reason.

MR. SCHURTMAN: We were also prepared to call industry witnesses on the subject of whether 7-1/2 IPS tapes are used to manufacture commercial record albums and we were also prepared to call engineers to testify as to the technical quality of 7-1/2 IPS tapes.

We are prepared to call Adam VIII suppliers and TV stations to testify as to the reasons why they stopped handling the Adam VIII album after receiving telegrams from Capitol.

We are prepared to call an Adam VIII accountant to give detailed testimony on our damage claims.

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THE COURT: Look, I am a little at a loss as to the reason for all of this now.

MR. SCHURTMAN: The reason for this, your Honor, is that we have all agreed --

THE COURT: We are not trying damages now. I want to make it clear:

I have certainly, and the record shows it, I have urged some limitation in the amount of evidence presented on this, but I don't want the record to be confused and to indicate that you are barred from submitting any proof that you really feel you need on this issue. So, for you to stand and say, I am prepared to do this and that, let's be very clear on where we stand.

MR. SCHURTMAN: Your Honor, this is a non-jury trial.

THE COURT: Sure.

MR. SCHURTMAN: You have indicated that witnesses can be scheduled at different times. They don't have to be consecutive. The only point I am making is that if your Honor, after reading the record, feels that there are certain areas where additional witnesses would be appropriate of the type that I have just indicated, then, we are prepared to produce them at that time.

THE COURT: I certainly in a non-jury case

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have made requests for witnesses.

MR. SCHURTMAN: That is my only point.

THE COURT: I really think that we have in this case and I want to tell you that I think I tried to follow the record as we have gone along, I have tried to think about it, and I think we have really consulted together in a sense about the order of what proof goes in, although, of course, the lawyers are the ones who know what is needed to prove their case. I don't expect to come up with any suggestions of calling additional people, so, please, don't realy on me in any way for that.

(Continued on next page.)

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MR. SCHURTMAN: No. The only other witnesses we want to mention are Mr. William Krasilovsky and the Benus executive who sold that famous watch to Mr. Kahl.

Again, I mention them only because I don't want adverse inferences to be made for my not calling them.

MR. PRETTYMAN: For the record, may we state that we have called witnesses on virtually the same subjects and, of course would have been prepared to cross examine their witnesses.

THE COURT: You have made that clear already.

MR. BERGEN: I want to make thatclear on behalf of my cleints, too.

THE COURT: I will assume that is true.

MR. SCHURTMAN: Your Honor, next I would like to offer certain paragraphs from defendants' amended joint statement of facts. These are paragraphs that we agree with and I wonder if I should simply read the numbers into the record at this point without reading the paragraphs.

THE COURT: Is it lengthy? I don't have the document before me.

MR.SCHURTMAN: It is a lengthy document. It is really almost like proposed findings.

THE COURT: I will get my copy and then we can see what we can do.

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MR.SCHURTMAN: All right.

MR. PRETTYMAN: You can mark it as an exhibit, if you want, and then you can tell me which paragraphs you want to draw to his attention.

THE COURT: We will probably do that. Just a second.

(Pause.)

MR. SCHURTMAN: Can I make a couple of other offers in the meantime while we are waiting?

THE COURT: Okay.

MR. SCHURTMAN: We will give you a brief designation of pages from the Menon and Coury depositions.

MR. PRETTYMAN: I thought you were going to show those to us first.

MR. SCHURTMAN: Sure. Could we arrange to send the designations to defendants' counsel Monday morning?

THE COURT: That is all with me.

MR. SCHURTMAN: We had originally planned to read them in and we didn't make extra copies.

THE COURT: Have you got that ready now? Have you got those designations ready?

MR. SCHURTMAN: I would have to go through it and see what is underlined.

THE COURT: Is it acceptable to the defense

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that they get -- that Mr. Schurtman gets to you by some time early Monday.

MR. SCHURTMAN: Yes, sir.

THE COURT: His transcripts of the Menon and Coury depositions were his designations and then you have the opportunity to make your designations or, indeed, to object if you think something is objectionable. Can we handle it on that basis and possibly just get it to me by messenger and then after it is all done and then put it on the record formally on Thursday afternoon. Is that acceptable?

MR. PRETTYMAN: Sure.

I just want to make sure that I get the designation before it is handed into the Court.

THE COURT: Yes, of course.

Then, as far as what you want to do to the Levy and Kahl depositions, I assume you probably haven't had time to do that.

MR. SCHURTMAN: No, we started to.

THE COURT: You can at the same time that you forward those other things, forward what you have done to the Levy and Kahl.

In other words, that bundle of things, just have it go around to the parties until you are through with it

and then get it to me. Okay. Consult together until you are finished.

MR. SCHURTMAN: Okay.

Does your Honor have the defendants --

THE COURT: What is the date of the one you are referring to?

MR. SCHURTMAN: The cover sheet says "Defendants Exceptions to Plaintiffs Statement of Facts and Defendants Amended Joint Statement of facts".

THE COURT: Yes, I have it. Why don't we mark this for identification.

MR. SCHURTMAN: All right.

THE COURT: The next plaintiffs' exhibit.

(Plaintiffs' Exhibit 102 was marked for identification.)

MR. SCHURTMAN: The document I am referring to is about six pages down.

THE COURT: Just a moment.

(Pause.)

THE COURT: You want to go to page 6?

MR. SCHURTMAN: It is really a new document that they have put together. After page 5 there is something called "Defendants Amended Joint Statement of Facts Disputed and Facts Not Disputed".

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Do you have that?

THE COURT: Here is what I have.

MR. SCHURTMAN: Let me show you what I have. This is the cover page and if you flip thorugh the first five pages.

THE COURT: I have it, okay.

MR. SCHURTMAN: What I offer in evidence are the following paragraphs: 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 15, 16, 17, 18, 30, 32, 40, 41, 52, 55, 57, 60, 61, 65, 69. I would like to offer 73 except for the last four words. The last four words are "solely for listening purposes." I would exclude that from my offer.

THE COURT: You don't need that. It is all over the record that that was delivered.

MR. SCHURTMAN: What wasn't clear from the record is that what was delivered was an EQ tape. That never came out clearly in the record.

THE COURT: All right, I will receive 73 without the last four words.

MR. BERGEN: I object to that, your Honor.

MR. PRETTYMAN: I have no objection to it going in so long as we move the remainder of it going in because I think you should read it in context.

THE COURT: No, that is a characterization

of yours.

MR. PRETTYMAN: I am not talking about the four words. He selected certain numbers out and I am saying that I haveno objection to the entire exhibit going in so that you can read it in context.

He takes a paragraph and then he skips two paragraphs and he starts in again. We think you ought to be able to read the thing in sequence.

THE COURT: Look, I haven't followed this at all. Just in theory it seems to me he has a right to take certain things from your document, which he regards as admissions or whatever, and certainly he isn't obliged to read your whole document.

MR. PRETTYMAN: I am entitled to move the document in and I now move that the remainder of it be received in evidence.

MR.SCHURTMAN: I do object.

THE COURT: I sustain the objection.

I will receive 73 except for the last four words or whatever it is.

Look, Mr. Prettyman, if there is a specific thing that is out of context and there is something else -- if it is distorted, but I couldn't accept this whole document en masse because it might just be a brief for you,

I don't know.

MR. PRETTYMAN: I haven't seen it.

I would have to read the entire thing to see whether he has distorted something by taking two paragraphs that look like they are related and they are not. I think it is unfair.

THE COURT: You can let me know. Anything in here that you feel is necessary to be read to put it in context. It is just like your answers to interrogatories. Treat it that way.

MR. PRETTYMAN: If it is not in evidence, how are you going to read it?

MR. SCHURTMAN: Your Honor, I don't object to your reading it as long as you treat it as an argument as opposed to evidence.

I cannot keep the Judge from reading anything that is filed. It is a question of whether it constitutes evidence.

THE COURT: Look, Mr. Prettyman, if, upon going through this,you feel that there is something here that is necessary to be included to prevent distortion, please drop me a line and offer it and I will rule on it.

I think you cannot deal with this this afternoon.

MR. SCHURTMAN: Let me continue. 73 except for the last four words.

THE COURT: All right.

MR. SCHURTMAN: 75, 76, 78, 87, 89, 91, 98, 99, 112, 118, 124, 127, 128, 129, 130, 132, 133, 138, 139, 140, 141.

That completes my offer on that.

THE COURT: 102 is for identification. I am going to consider that I will receive those paragraphs and I can get them marked in some way subject to any comment that I receive from defense cojnsel. If, for instance, in the light of the case as it now stands they have some objection on grounds of relevancy or even whatever, I can receive that objection next week. They can drop me a line with a copy to you and if they feel that there is some portion of this that should be received to make your positions clear and undistorted, they can also drop me a line. That is the way we will leave that document.

Okay.

MR. SCHURTMAN: All right, at this point, your Honor, we would like to offer the TV commercial and play the Roots album.

THE COURT: Okay.

MR.GRUMBACH: Your Honor, I have two questions

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I would like to ask on voir dire about that.

THE COURT: About what?

MR. GRUMBACH: The TV commercial.

THE COURT: Who is your witness?

MR. GRUMBACH: Mr. Levy will be satisfactory and I think we might even be able to stipulate. I just want to ask whethere there was any approval of any of the photographs of Mr. Lennon that were included?

THE COURT: Approval by whom?

MR.GRUMBACH: By anyone representing the plaintiffs.

MR. SCHURTMAN: Approval in what sense. We claim they were a part of the deal.

MR. GRUMBACH: In other words, did Mr. Lennon approve these?

THE COURT: Wait a minute. This is evidence which you are now offering, right, so let's get some marking put on it. Howare you going to lay a foundation? Are you going to put Mr. Levy on the stand?

MR. SCHURTMAN: I will put Mr. Levy on the stand.

THE COURT: Okay, Mr. Levy, take the stand and he can be questioned.

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MORRIS LEVY, having previously been duly sworn, resumed the stand and testified further as follows:

THE COURT: All right. Plaintiffs' 103 for identification is marked.

DIRECT EXAMINATION

BY MR. SCHURTMAN:

Q Mr. Levy, you testified previously that when you released the Roots album you had television commercials made which were shown on television stations until they were stopped?

A That's correct, sir.

Q Who made these television commercials?

A The company that did the physical work?

Q Yes.

A I don't know the name. But it is under our -- we paid for it, I mean, but I don't know the actual company that did it.

THE COURT: Was it one commercial?

MR. BERGEN: I believe there were two commercials. There was a short one and a long one.

We would like to see both of them.

THE COURT: All right.

Were there two commercials, do you recall?

THE WITNESS: There was two full commercials made, to the best of My knowledge, and four, if you go with the one-minute and the two-minute --

THE COURT: I don't hear you.

There were how many?

THE WITNESS: If you go by the one-minute and two-minute, sir, there were four. We picked the best one -- two-minute and made another one-minute from that two-minute.

THE COURT: Take it easy. There were four commercials made?

THE WITNESS: There were two two-minute commercials made and from the best two-minute commercial we also took a one-minute commercial from that. I think that does it.

THE COURT: So you ended up with three?

THE WITNESS: No, a two-minute and a one-minute. And the other one we didn't use at all, we rejected that one.

THE COURT: So you ended up with the best of the two-minute commercials and then the one-minute commercial made from that?

THE WITNESS: Yes, sir.

Q Do these commercials contain pictures of John Lennon?

A Yes, sir.

Q Where did you obtain those pictures?

A We bought them.

Q From whom?

A I don't know the name, but I think in earlier testimony there was a bill here that reflected -- I know there was a letter that was brought out earlier that we bought some pictures.

Q Did you obtain any express written authorization from Mr. Lennon to use his picture?

A No written authorization, no, sir.

Q Were you using these pictures to advertise the album that he had recorded?

A Yes, sir.

Q I show you Plaintiffs' Exhibit 103 for identification. Can you tell the Court what this is?

A This is the -- I think it is called a cassette-type for showing films. It is the same principle as an 8-Track, but it is for a film. It is self winding.

THE COURT: Is this the two-minute or the one-minute?

THE WITNESS: They are both on here, sir.

It may start in the middle, your Honor, because it is self-winding.

MR. SCHURTMAN: Let's state for the record what we are doing.

MR. BERGEN: Before we do that, your Honor, may we just ask Mr. Levy one question?

THE COURT: Are you finished with your questions?

MR. SCHURTMAN: Let me state that I am now prepared to show on a Fairchild 70-7 viewer the commercials that Mr. Levy has just identified.

THE COURT: All right.

You are offering Exhibit 10 right?

MR. SCHURTMAN: That's correct.

THE COURT: Is there any objection or voir dire?

MR. BERGEN: I have one question.

Mr. Levy, was the oral consent that you just testified to from Mr. Lennon to use his picture and his name, was that explicit oral consent?

MR. SCHURTMAN: I didn't say that.

THE WITNESS: I didn't say that.

MR. BERGEN: You said it wasn't written?

THE WITNESS: I didn't say I got oral consent. I just said --

MR. BERGEN: You didn't get oral consent?

THE WITNESS: It was never brought up, oral consent.

MR. SCHURTMAN: If you are going to ask him a question in terms of his prior testimony, he testified that he was making these commercials as part of the agreement under which the album had been recorded.

MR. BERGEN: But there was a question from Mr. Grumbach, I believe, if he had ever --

THE WITNESS: Mr. Grumbach didn't ask me any questions.

MR. BERGEN: Didn't you ask him a question about his written consent?

MR. GRUMBACH: No.

MR. SCHURTMAN: I asked him whether there was written consent and he said no.

THE COURT: Does anybody have questions?

MR. BERGEN: I am asking if there was oral consent, that's all.

THE WITNESS: When I called, you mean, at the end of January?

MR. BERGEN: Was there oral consent at any time?

THE WITNESS: No.

MR. BERGEN: All right.

THE COURT: We have Mr. Bergen's question.

Do you have questions?

CROSS EXAMINATION

BY MR. PRETTYMAN:

Q Did you get the pictures from the same place that you got the picture for the cover, that is, from Bill Dietz Associates?

A I'm not sure. We bought quite a few pictures from him and some from others. I couldn't swear to that.

Q Did vou get it at the same time as you got the pictures for the album?

A Approximately the same time as we were doing both.

Q Do you have any letters of conveyance of the pictures to you that you used on the television?

A Not with me. I don't know if we have or not.

Q This Defendants' Exhibit AG refers to sending you 16 John Lennon photographs for TV reproduction. Is that what you got?

A I don't know. It may be. I didn't physically get the 16, look at them and put them on, so I don't know.

Q And this letter contains the sentence:

"Your company is responsible and libel for

the permission and release of the talent photographed and pictured, namely, John Lennon."

Correct?

A If you say so, it's there.

MR. PRETTYMAN: That's all.

THE COURT: Mr. Grumbach, do you have anything?

MR. GRUMBACH: No any more.

REDIRECT EXAMINATION

XX BY MR. SCHURTMAN:

Q Mr. Levy, you just told Mr. Bergen that you did not have oral consent. Was it your understanding that these commercials were being made pursuant to the agreement which you claim was made on October 8?

A Yes.

MR. PRETTYMAN: I object as leading, your Honor.

A If you have a --

THE COURT: I will overrule the objection.

A If you have a record deal it's understood you are going to use the likeness of the artist to sell the record. I misunderstood when he said "oral".

MR. SCHURTMAN: I offer in evidence the tape and I offer --

THE COURT: Any objection to 103?

MR. PRETTYMAN: No.

THE COURT: 103 is received.

(Plaintiffs' Exhibit 103 was received in evidence.)

(Tape played.)

THE WITNESS: That is the two minutes.

(Tape played.)

THE COURT: Do you want to play the records?

MR. SCHURTMAN: Yes, your Honor.

At this time we offer to play the Roots album. We have brought some equipment along. I will identify it as a Panasonic portable record player of the type used by a teenager, to wit: my 14-year old daughter Debbie, who is one of Mr. Lennon's admirers; he mentioned her in his testimony as seeking his autograph.

THE COURT: If you are going to play the John Lennon album -- you are going to play that now, is that right?

MR. PRETTYMAN: Yes, sir.

THE COURT: Do you intend to play any of those tapes, or I suppose that would be a waste of time?

MR. BERGEN: I didn't hear you.

MR. PRETTYMAN: Is there any utility in playing some of the tapes or would that be a waste of time?

MR. BERGEN: I don't believe so, your Honor.

THE COURT: We will forget that.

MR. PRETTYMAN: We are also going to ask that you listen to -- we ask that you make anote of the songs, comparing them, and we are also going to ask you to listen to one song, at least one album consecutively.

MR. GRUMBACH: I believe we were going to have a stipulation, and I will pose it, and if Mr. Schurtman disagrees then he may.

The originl 7-1/2 inch tape copy which was used to produce this record was first taken to the studios of Meteor Sound, which made a master which was unsatisfactory to the plaintiffs.

It was then taken to Bell Sound and at that studio Mr. Fred Bailin, a Roulette A & R man, was present when when the Bell engineer, Mr. Brezzio, tried to make and did make a new lacquer master, and in the process of doing that he adjusted the controls in order to make the lacquer master "brighter" than the original tape, and he incbeased the sou[illegible] level.

Bailin was there during this process and it was this process which altered the relative frequencies of the sounds by increasing the middle range sounds, which ultimately resulted in the Roots album record.

THE COURT: Is that acceptable?

MR. SCHURTMAN: Just a moment.

MR. GRUMBACH: This is taken from the deposition before trial of Bell Sound Studios, Corp., by Joseph Brezzio.

MR. SCHURTMAN: I didn't follow the last part where Mr. Grumbach was getting technical.

MR. GRUMBACH: I will be glad to read from the deposition.

THE COURT: What do you want to have read over, Mr. Schurtman?

MR. SCHURTMAN: Would you stipulate that this process is used with all lacquer masters?

THE COURT: That is not the point.

MR. SCHURTMAN: In that case I won't accept the stipulation.

THE COURT: It is a question of what was done in this case to this tape; it is just a question of fact.

If it is a fact or is it not a fact, we can have the fellow come in.

MR. GRUMBACH: He testified to these facts before trial, your Honor.

THE COURT: I suppose he is right uptown.

Who was it, Mr. --

MR. GRUMBACH: Brezzio, hired by the plaintiffs, and who they listed as a possible expert witness in this case.

MR. BERGEN: He was hired by them and listed as a possible expert witness.

THE COURT: We can, I am sure, have the witness brought down very easily, but what I think Mr. Grumbach is suggesting is if he came down he would testify to this and nobody could really rebut it.

It doesn't cover the whole case. It doesn't cover industry practice or anything like that; it doesn't even purport to.

But will you accept as simply a statement of fact for this case?

MR. SCHURTMAN: I accept it only with the modification that this is done in all instances, otherwise you are left with the inference that this was a peculiar process used in our case.

THE COURT: I am not left with that inference at all.

MR. SCHURTMAN: If that is not the inference then I accept it.

THE COURT: All right.

MR. KANZER: I don't think that Mr. Grumbach meant to say that there were changes in the frequencies of the sound. It would only be in the relative intensity, that is, the volume, of one frequency as compared to another.

THE COURT: Let's get these records played, and you, while the records are playing, and we are all enjoying them, you and Mr. Grumbach work on a stipulation.

MR. GRUMBACH: I will agree with Mr. Kanzer's modification.

MR. BERGEN: Can we have a statement on the record that this record that is being played was one of the original records and was not made specifically for the purposes of being played today.

MR. SCHURTMAN: I will represent that this is one --

THE COURT: This is the exhibit, isn't it?

MR. SCHURTMAN: No.

(Continued on next page.)

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THE COURT: This is one of the original Roots records.

MR. SCHURTMAN: I will represent that this is one of the original Roots records. It's been played several times by assorted teenagers, it has not been tampered with, Mr. Bergen, except to the extent of having been played several times.

THE COURT: What is the stipulation now?

MR. GRUMBACH: The only modification was, Mr. Kanzer added that the mid range frequencies had been intensified in relation to the other frequencies.

THE COURT: And that is accepted. Fine. Thank you. Can you let me know what the songs are as you play them.

MR. PRETTYMAN: Your Honor understands that we don't accept the part of Mr. Schurtman's statement that this is a typical machine that a teenager would listen to in playing a John Lennon album.

(Record played.)

MR. LENNON: It is not the proper speed. I don't think it matters for this case, I am just making the statement that it is off. It is not normal. It sounds like Mickey Mouse.

MR. SCHURTMAN: I will bring in another machine

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Thursday.

MR. BERGEN: It is very important that you hear the verison of You Can't Datch Me on this album and on the rock and roll album.

MR.SCHURTMAN: Why.

MR. BERGEN: Because he didn't give Mr. Levy the finished album.

THE COURT: Let's leave it this way, I think that it would be -- I just assume that it would be of some interest to hear the music and why don't we arrange to have a proper machine brought in and play the two records. Isn't that sensible? You can't get this working?

MR. GRUMBACH: I will object to playing this on a machine that Mr. Levy concedes is no good.

MR. SCHURTMAN: Could you arrange to have some equipment brought in on Thursday, Mr. Levy?

MR. LEVY: Yes.

MR. SCHURTMAN: Can we explain something for the record?

THE COURT: Would you like to take it home and play it?

MR. BERGEN: I don't see why they can't stipulate that the two versions of You Can't Catch Me are different, and anybody who listens to the song can tell,

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and if they have listened to it, by now they should have realized that the first 55 seconds of the song, after the first two minutes plays, is repeated, and that didn't happen with -- that is the Spector edit.

THE COURT: I don't think there is any real dispute about that. Does anybody object to having me take the two records home. My record player is on the blink worse than this, believe me, but my law clerk has one and we could just play the things over at her apartment. Does anybody object to that?

MR. SCHURTMAN: No objection.

MR. BERGEN: No objection. We would also like --

THE COURT: We could have a processional up to a midtown studio but I don't think anybody is interested to do that.

MR. BERGEN: We would like your Honor to listen to either Angel Baby or Be My Baby which are the two songs that Mr. Lennon took off the record for, as he testified, for artistic reasons, because they didn't sound good. The otherthing that is important is that your Honor not change the volume between the two records, because Mr. Lennon testified he thinks there is a difference.

THE COURT: All right. We will leave it at that.

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They are exhibits and I will try and play them over the weekend, as instructed.

MR. BERGEN: We just have one more point.

What has happened with the depositions of Mr. Levy and Mr. Kahl that we marked with the red line? They were never admitted into evidence.

THE COURT: I thought we covered that. In other words, they are going to be -- the plaintiffs, Mr. Schurtman is going to indicate what he wants and that is going to be delivered to you, without going into immense detail. The depostions have to circulate back and forth until you have all got your comments and linings and so forth in, and then they come up to me. The only thing is, you are using red so the plaintiffs use blue so I know who is offering what. That will help me.

MR. BERGEN: The last thing is, we just wanted to add a portion of one of the answers to interrogatories to include the answer that sets forth the alleged contract, because that is not in the exhibit, the excerpted exhibit --

THE COURT: Where is that?

MR. BERGEN: WE don't have it, but we can do it on Monday.

THE COURT: Sure. That is easy enough. Are we finished?

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MR.GRUMBACH: We would also like to do that with respect to the plaintiffs' statementof facts which they submitted, just put in some paragraphs of theirs and they have done with ours.

THE COURT: You ought to be able to do that now. Why don't you do that now?

MR. GRUMBACH: All right, your Honor.

This is a document entitled Plaintiffs Statement of Disputed and Undisputed Facts.

THE COURT: You have the -- give us a minute to get it from the file.

MR. GRUMBACH: Dated November 7, 1975.

THE COURT: Allright. I have it.

What do we call it?

MR. GRUMBACH: CQ. Start with No. 19, 34. I believe that is all, your Honor.

THE COURT: I will recieve 19 and 34 subject to the same -- if there is any amplification you want to call my attention to youmay do so.

Anything else at all?

MR. SCHURTMAN: At this time the plaintiffs make a motion to amend the pleadings to conform to the evidence.

THE COURT: I don't know whether that makes

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the pleadings go up or down is my problem. I don't know what that means. Specifically what?

MR. SCHURTMAN: What it normally means is that once proof has been admitted by court to the extent that there is an inconsistency between the pleadings and the proof. The pleadings are amended to conform tothe proof. That has always been my understanding.

MR. PRETTYMAN: I think the motion is meaningless in terms of being able to deal with it, because of course we don't know, we have no -- we are not on notice as to what it is wherein the complaint is different than it was originally. No. 1. No. 2, we take the view there problaby is not that their complaintis bad, the complaint is bad on its own, but that is not really the problem. The problem is with the proof itself, that is, if you listen to the proof it isn't a question of the extent to which it corresponds with the complaint.

THE COURT: I think the motion -- I don't know what such a motion should mean -- would mean, and I don't know what pitfalls would lie in granting the general motion like that. Have you got some specific amendment that you want to propose that you feel you need, call my attention to it, but I won't grant that general motion.

MR. SCHURTMAN: You have raised on one occasion

the question of why we pleaded that there had been an agreement as to worldwide rights, and I started to explain and at that time the witness was testifying and it wasn't really appropriate for counsel to argue, but the reason that was done, your Honor, the plaintiffs took the position that at the October 8th meeting there was an agreement, a definite agreement as to U.S. mail order rights and there was an agreement with respect to retail fulfillment centers and worldwide rights, subject to getting EMI's consent.

Mr. Levy testified that there came a point in late 1974, or possibly more than one occasion, when Mr. Seider told him first that no consent was necessary for the retail fulfillment center rights and at a later point that there was no need to go to England to get EMI's consent at all.

Now, based on that, we pleaded, and we intended to prove, if we could, that there had been subsequent ratification of the worldwide rights, and that is why in the complaint itself, which is a form of notice pleading, we alleged worldwide rights.

Now, during discovery Mr. Levy testified in his deposition as to the distinctions. So it doesn't exactly come as a surprise to defendnats when we try to prove these distinctions at this trial.

Now, apparently an issue has been made of the

fact that in the complaint we pleaded worldwide rights and that there now are various formal pleadings and various documents we have insisted that we are going to try to prove worldwide rights. If it is necessary to amend the pleading to spell out the distinctions, the specific distinctions that were made at the October 8th meeting, then I suggest that the pleading be amended -- I move that the pleading be amended to conform to the proof as it was actually received by your Honor at this trial.

That is the purport of my motion.

MR. PRETTYMAN: Your Honor, I cannot imagine a statement that would more eloquently underpin the point that I just made that what they are really doing is, throughout this entire case up until this trial, they have taken the position that there was one agreement on October 8th and it dealt with mail order retail fulfillment and foreign and that was their testimony on deposition and that was their version right up until this trial, until they realized they had some problem. Then there was the testimony shifted and your Honor was on to that right away, and interrogated him at length about that. The problem is not that there complaint is bad and should be changed, the problem is with their proof, which shows that there was one agreement and that they didn't get the permission

that they now admit that they needed. To change the whole theory of the case at this late date, as we are about to leave the courtroom, so that we have a theory that you really have three contracts instead of one, and than you can somehow deal with each as if the parties dealt with them as three contracts on October 8th, which has never been the testimony, I think is outrageous and it is the most prejudicial thing that could possibly happen to us.

If we had been on notice at the beginning of this case that they were claiming three contracts we would have approached it entirely differently. Depositions and discovery would have been conducted differently and the whole case would be in a different posture.

MR. BERGEN: Your Honor, I'd like to join in that and say again for the record that in at least two places Mr. Levy, and probably in his deposition, swore under oath to the exact language that is set forth in the complaint. He swore under oath that there was an exclusive worldwide agreement for television mail order and retail sales and to change the case at this hour, almost a year after the case was started, is, as Mr. Prettyman said, outrageous and very prejudicial to the defendants.

MR. GRUMBACH: May I add something, please? I just want to add to that that the -- it is significant to

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note that inthe middle of this case Mr. Schurtman asked to put back into his complaint a fraud count against the defendants, a count which alleges misrepresentations by the defendants which now Mr. Schurtman admits were never made.

MR. SCHURTMAN: I don't admit to anything. I don't know what Mr. Grumbach is talking about.

MR. GRUMBACH: By amending your pleadings you are conceding that some of the representations that you had claimed that your client relied on were never made to him.

MR. SCHURTMAN: If you want to argue that my position is prejudicial you are entitled to do it. I resent when people say that something I tell the Court is outrageous, I do. But let me address myself to the point, your Honor.

The point is that in a pleading and the informal documents we took the position that there was an agreement for worldwide rights. During discovery Mr. Levy made it very clear in his deposition as to what had taken place at the October 8th meeting. He testified, as he again testified at this trial, that he was told that with respect to U.S. mail order rights, you have it. With respect to the other rights, Mr. Seider said, he has to get

EMI's consent.

Mr. Levy, when he wrote his letter of January 9, had had subsequent conversations with Mr. Seider which he construed as either ratification or an indication that no consent was needed.

We now come to trial. You have heard all the witnesses. You have heard what the facts are from the mouths of the witnesses. All I ask your Honor to do is to go according to the facts that you have heard and I have explained that the pleading was done in the broadest sense because we hoped to prove the maximum. Whether we succeeded or not is for your Honor to decide.

THE COURT: Mr. Prettyman, are you saying this, that the Court should -- I am not clear on your position. Let us suppose that a contract were proved here of the kind that Mr. Schurtman summarized or stated as the claim as of whatever it was, Wednesday night, whenever that was, when I interrogated Mr. Schurtman as to what the termswere and he outlined his present contention, the plaintiffs' present contention of the terms. I guess that was Wednesday night, wasn't it?

MR. SCHURTMAN: I believe that is correct.

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THE COURT: Anyway, that is in the record.

Now, there is no question that that varies from what was pleaded, and, Mr. Schurtman, well, it is obvious, and that is the point of his present motion. So I ask you this, obviously you know there is a dispute, a complete dispute about whether even that contract is proved on the facts; right?

MR. PRETTYMAN: Right. No matter how he changes his complaint. I agree with you on that. No matter how he changes his complaint we still have a basic issue.

THE COURT: Yes, of course. You do not admit, of course, that there was a contract for U. S. mail order rights or anything.

MR. PRETTYMAN: Of any kind. That's right.

THE COURT: But let me ask you this:

As a matter of pleading and procedure or whatever you want to call it, suppose for instance that there were enough evidence to show the making of that contract; would you assert that as a matter of pleading he is barred from asserting that contract, recovering on that contract, because of pleading a broader and different contract before the trial?

MR. PRETTYMAN: Let me give you an example,

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your Honor, to make my point.

THE COURT: Okay.

MR. PRETTYMAN: Let's suppose he had pleaded a written contract and we had gone through -- then he produced a piece of paper -- and we had gone through our depositions all about the piece of paper and he got on the stand here finally and we moved that the pice of paper was, whatever, it was non-existent, a fraud, or whatever. And he then said, yes, but they told me that night so-and-so, and I relied on that oral promise as well as the written promise.

Mr. Schurtman gets up and says, "I move to make the evidence conform to the -- make the complaint conform ot the evidence. And we thereupon suddenly have a question of whether we have an oral contract.

Now, I say that the defendants are prejudiced irrevocably by that kind of an approach that they are entitled at some point to be aware of precisely what the plaintiffs' position was in regard to the case. And I don't think it is any different here, sir, in the sense that there is a great difference between claiming that you have three contracts, or one contract, when you are talking about an oral contract on a specific night in question.

It just simply is not true, sir, that we were

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on notice that he was claiming that this was several divisible contracts instead of one indivisible contract.

THE COURT: Let me tell you, your position would ease my load immeasureably if I did not permit this amendment, or at least consider it between now and the time I decide, I would have nothing to do. His case would be over with. Because he has admitted -- when I say he, Mr. Schurtman -- on behalf of the plaintiffs has admitted to me that the only contract that they now claim is what he outlined on Wednesday night.

Now, if as a matter of law and procedure I am not to consider that as making a case here, I don't have anything further to to. We don't have to come back here Thursday and the case is over with.

MR. PRETTYMAN: I think you just talked me out of my objection, because --

THE COURT: Obviously that doesn't make sense.

MR. PRETTYMAN: No, but I just want to point out the prejudicie of this type of procedure. I really do think that -- let me put it to you this way, your Honor:

I will withdraw my objection so long as it is understood that what you are now attempting to do is to go back and to determine regardless of what the complaint said or anything else said as to what was actually agreed

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upon that evening.

I do think, however, that in deciding that, sir, you can take into consideration the complaint and pleadings and the January 9th letter and all the other sworn statements, as well as the depositions. And the change that took place in this theory.

Now, so long as you are able to consider all of that in determining what was really supposedly agreed to that night, then I have no objection. And I am speaking only for myself. But, if this means, if this change means that you can ignore the sworn statements and the complaint and the depositions on this point, then of course I say I am going to stand by my objection.

THE COURT: All right.

MR. BERGEN: I would like to add that the affidavit by Mr. Levy in the State Court and the sworn answers to interrogatories were submitted after his deposition and right up until the plaintiffs' statement of disputed facts filed in this case in November they alleged the same contract, exclusive worldwide rights for mail order and television.

MR. GRUMBACH: I would just like to join in what was said, and I think it might be appropriate, although I am sure your Honor will reserve, to cross move

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at this point for a dismissal. If the amendment is granted, then I think your Honor can also consider after granting the amendment dismissing the complaint on the ground that the testimony before this Court has been incredible and can do that simply by looking at the changes.

THE COURT: Now look, I think the way we will proceed is the way we have really been carrying on the last several days, and that is we are inquiring about the question of whether there was a contract, and it was at the end of the day, Wednesday, when I became concerned that I wanted to understand the exact contention of the plaintiffs as to what they were now claiming the contract was. And that question was provoked by some review of the record, and so I raised a point that brought forth the statement that we are all familiar with from Mr. Schurtman.

We continued to try the case, nobody moved to dismiss, and I think nobody realistically expects it now on just a formal pleading kind of thing. That wouldn't make any -- it wouldn't bring any satisfactory resolution to our problems.

So I think that Wednesday night in the discussions it was perfectly clear, and I just think I would

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be repeating myself, all the relevant evidence will go into that determination and the question for me is what does all the relevant evidence show. And of course I will have to consider, and I think I put you fully on notice of that, the question of whether any changes of position and so forth would bear on the issue of fact.

So in answer to Mr. Prettyman's question, I think I indicated Wednesday night I would consider it, and I was the one who articulated that kind of an issue. So there is no question about that.

Now, how it comes out you have to consider that and all the other evidence. You don't focus on one segment of the evidence and one segment only. I think I would like -- I want to make sure, though, I think your comment, Mr. Bergen, triggered this -- I want to make sure that I have the chronology of the various pleadings, deposition statements, and so forth, and is it chronologically in the volume you gave me?

I guess it is.

MR. BERGEN: It is not chronologically. No, it isn't, your Honor. We will be happy to do that, your Honor.

MR. PRETTYMAN: We will be happy to get that.

THE COURT: In other words, I think it is

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important, in fairness to both sides, to have the various statements made by or on behalf of Mr. Levy as to the terms of the contract laid out in chronological order, and so forth. I thought you had done that in this document.

MR. BERGEN: We didn't have time to really straighten them out in chronological order, but we will do that.

THE COURT: In other words, what you have just said to me now, is that even after the deposition testimony Mr. Levy adhered to his characterization of the terms of the contract.

MR. BERGEN: Long after. One of the sets of answers to interrogatories was submitted in September.

THE COURT: I'm afraid I will have to ask you for a memo on that.

MR. BERGEN: Fine, your Honor.

THE COURT: All right.

Are we finished? So I think in tesponse to your motion, Mr. Schurtman, I am going to consider the issues as I stated. I don't think a formal amendment is even necessary.

MR. SCHURTMAN: No.

THE COURT: Now, is there anything else at all this afternoon?

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MR. SCHURTMAN: No, nothing at this point, your Honor.

THE COURT: All right.

I will have to say that we borrowed some exhibits in the form of records. We have done little record playing. I hope nobody objected to that.

MR. SCHURTMAN: Not at all.

THE COURT: All right.

MR. SCHURTMAN: I hope you enjoyed them.

THE COURT: We enjoyed them very much.

(Time noted: 4.55 p.m.)

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Big Seven Music Corporation, et al.

v. 75 Civ. 1116

John Lennon, et al.

New York, New York

February 5, 1976
3:00 p.m.

- - -

(Trial resumed.)

- - -

THE COURT: All right, Mr. Schurtman. Would you like to lead off?

MR. SCHURTMAN: At this point I simply wanted to address myself to some housekeeping matters, marking exhibits and so forth.

THE COURT: Okay.

MR. SCHURTMAN: In the first place, we did make available to the defendants the Menon and Coury depositions, Plaintiffs' Exhibits 104 and 105, with our designations underlined in them. I believe the depositions have been filed.

I would like to move our designations into evidence.

THE COURT: All right.

What I am doing is I think to receive them

to the extent of the marked designations.

MR. SCHURTMAN: That is correct.

THE COURT: 104 and 105 are received to that extent.

MR. SCHURTMAN: All right.

(Plaintiffs' Exhibits 104 and 105 were received in evidence.)

MR. SCHURTMAN: Next, I just want to ascertain the status of the Levy and Kahl deposition where we made supplemental designations. I wanted to make sure that these were in.

THE COURT: I don't think there has been any objection.

MR. SCHURTMAN: All right. Then I assume the supplemental designations are in evidence.

THE COURT: Exhibit CN for identification, which is Mr. Kahl's or Kolsky's deposition is received to the extent of the designation and Mr. Levy's deposition is also received to the extent of the designations, CM-1, CM-2 and CM-3.

(Defendants' Exhibits CN, CM-1, CM-2 and CM-3 were received in evidence.)

MR. SCHURTMAN: On Plaintiffs' Exhibit 102 -- these are the defendants amended joint statement of facts --

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just want to be certain that the designations I made last time were received in evidence.

THE COURT: I haven't seen any objection to them.

MR. GRUMBACH: Your Honor, we wrote you a letter indicating that we felt that it would not be proper to take the designations that Mr. Schurtman had indicated out of context and suggested that you include certain other plaintiffs which complete the statement.

THE COURT: I will have to do that now. I am very sorry. I didn't get that taken care of.

MR. SCHURTMAN: I object to the other paragraphs on the grounds that --

THE COURT: All right. We will just have to cover that now.

I don't want to struggle. There is abundant evidence in and I won't take in paragraph 66.

Do you object to that, Mr. Schurtman, 66?

MR. SCHURTMAN: That is the one that they offered?

THE COURT: Yes.

MR. SCHURTMAN: Yes, I do object.

THE COURT: All right. I sustain the objection.

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MR. GRUMBACH: Your Honor, will you note our objection to their offer of the other part?

MR. PRETTYMAN: In which I join, your Honor.

MR. BERGEN: So do I, your Honor.

THE COURT: What do you mean?

MR. GRUMBACH: They have offered parts of our statement of fact. We have made an objection to that offer on the ground that if you just take the parts that they are offering you have it out of context and we have said that we will not object to their offer if you will also --

THE COURT: Okay. I will note your objection.

I take it you object to the defendants' request that Plaintiffs' 79 through 81 go in, right, Mr. Schurtman?

MR. SCHURTMAN: Yes, I do.

THE COURT: Okay. I sustain that objection.

MR. PRETTYMAN: Your Honor, I assume our objections are continuing so we don't have to make them each time.

THE COURT: Okay. Any objection to 137 going in?

MR. SCHURTMAN: Yes.

THE COURT: Was it filed?

MR. SCHURTMAN: No, but we would want to explain why it was not filed at that point.

THE COURT: If it is a fact you can explain it.

MR. SCHURTMAN: We haven't had an opportunity to explain it.

THE COURT: I will admit that, 137, if it is a fact, and if it is necessary you can certainly explain it.

MR. SCHURTMAN:Okay.

THE COURT: All right. That takes care of that.

Anything else in the way of housekeeping?

MR. SCHURTMAN: We had promised your Honor a summary of the cost figures that Mr. Levy had testified to.

THE COURT: Summary of what?

MR. SCHURTMAN: Of the costs that Mr. Levy had testified to.

THE COURT: Okay.

MR. SCHURTMAN: We have prepared it based strictly on what is in the record. So if I may hand that up.

MR. BERGEN: Your Honor --

MR. SCHURTMAN: It is in the form of a memorandum, not evidence.

THE COURT: It is a brief on the evidence, right?

MR. SCHURTMAN: Yes.

MR. PRETTYMAN: We have never seen it, of course.

MR. BERGEN: Secondly, I would assume, since I went over that Exhibit 89 that Mr Schurtman went through, it is in direct conflict with that, because that was also represented to your Honor as being a summary of Mr. Levy's testimony in the morning, and if we had had an opportunity to cross examine Mr. Levy we would have shown that that was in direct contradiction of his testimony.

THE COURT: He is just submitting a memorandum.

Okay. Can we get started with the argument.

MR. BERGEN: Your Honor, we have one or two things. We wanted to also put in, make sure it was in evidence, Defendants' Exhibit CQ, which was certain portions of plaintiffs' statement of undisputed and disputed facts, and we discussed those on Friday and we designated certain paragraphs in there. I believe there are only a few paragraphs.

THE COURT: All I have is 19 and 34.

MR. BERGEN: That's all, your Honor. We just

wanted to make sure that they were in evidence.

THE COURT: It puzzles me that you want to put in 34.

MR. BERGEN: There is a very good reason, your Honor, because that is another time --

THE COURT: Are you admitting that on October 8, 1974 Lennon individually and on behalf of Apple agreed with the plaintiffs to the following?

MR. BERGEN: No,that is a disputed fact. That comes under the heading of disputed facts, and the reason we want to put that in is because that was another time that theplaintiffs stated in documents filed in this court as to a worldwide agreement.

THE COURT: It ought to be clear. Somebody could get fanciful and say that you were -- you know, this was an admission. So I think you better put in the caption for that, shouldn't you?

MR. BERGEN: All right, your Honor. I believe the caption says disputed facts.

THE COURT: I think you better put in really pages 5 and 6 of that document. Otherwise, it is going to be very confusing.

MR. GRUMBACH: Your Honor, in that connection I think I should point out that in, for example, the document

that we submitted to your Honor, which we have had reference to here as the compendium which was submitted on January 28th, we submitted a lot of testimony by Mr. Kahl and Mr. Levy which we submitted to you in the brief that you would understand that it was for the purpose of showing inconsistencies rather than anything else.

THE COURT: Right. I don't think that has the same problem.

Okay. I am just going to mark this paragraph 19 and then pages 5 and 6 are admitted.

MR. BERGEN: The last three items that we have, your Honor, that we talked about on Friday, was Defendants' Exhibit AS-1 that we have marked has added a page or two from the plaintiffs' answers to Apple's first set of interrogatories. AS is already an exhibit. We are just adding a couple of pages.

THE COURT: You have the physical exhibit up here?

(Defendants' Exhibits AS and AS-1 was received in evidence.)

MR. BERGEN: The last two exhibits we wanted, your Honor, would be CR and CS, which are the federal complaint and the federal amended complaint.

(Defendants' Exhibits CR and CS were

received in evidence.)

MR. PRETTYMAN: Your Honor, we have referred both in cross examination and generally a number of times to Mr. Levy's testimony, sworn testimony, before Judge MacMahon. I had planned in several instances to cite it in my closing argument. If it is necessary to actually mark that and enter it as an exhibit in order to refer to it in any way, then I would like to so move.

THE COURT: I guess you better.

MR. SCHURTMAN: Your Honor, may we have everything that was before Judge MacMahon in evidence?

THE COURT: You want everything before Judge Mac Mahon?

MR. PRETTYMAN: I have no problem with that.

THE COURT: We will deem it as part of the record of this trial.

MR. PRETTYMAN: Fine. Do you want it marked then?

THE COURT: No, no.

MR. PRETTYMAN: We can deem it as part of the record for purposes of this proceeding.

THE COURT: I think that's clear enough.

MR. PRETTYMAN: That is fine.

THE COURT: All right.

MR. SCHURTMAN: Your Honor, in what sequence do you expect counsel to sum up? I assume that as the plaintiff I would have the right to close, but if that is not the case, I would like to clarify it.

THE COURT: I guess we still have that rule in civil cases that before a jury the plaintiff goes -- how is it, the plaintiff goes last?

How would you all plan to do it?

MR. PRETTYMAN: We had sort of assumed that since the burden was upon them on this issue that they would go first.

MR.SCHURTMAN: May I have the right to rebuttal then?

THE COURT: Yes, that is fine.

MR. SCHURTMAN: If it please the Court, before plunging into a detailed analysis of the facts and law in this case let begin my presentation by directing the Court's attention to what I consider several particularly significant items of evidence, which in my mind really frm the framework for the entire case.

First, I think it is undisputed that the purpose of the October 8th meeting was to discuss Lennon's non-compliance with the Come Together settlement and what to do about it.

Second, the evidence shows that to this very day Lennon has not yet complied with the Come Together Settlement.

Third, defendants' own undisputed statement of facts admits -- and let me quote the exact language -- in paragraph 40, which is now in evidence, that "Lennon stated that he had lost interest in finishing the album." This is in connection with the oldies album.

Fourth, it is undisputed on the basis of the testimony that Lennon regained his enthusiasm or at least his desire to complete the oldies album after he, Seider and Levy had discussed the recording of 15 or 16 songs for a TV package.

And finally, Mr. Lennon admitted on several occasions that until Capitol talked him out of it on January 28, 1975 he was in fact planning to sell the album as a television package. He thought that letting Levy do the package would resolve the problems with everyone, including Levy -- that is at pages 1915 to 1916 of the transcript -- that Levy was, to use Mr. Lennon's own words, the front runner on the package, and that he wanted Levy to have it.

Even Mr. Seider testified at page 2096 that he told Capitol that giving the TV package to Levy

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would be a way to resolve the Come Together dispute.

Now, let me add three other key points.

First, I think the evidence showed that it is not at all unusual in this industry to have oral agreements where performance, either complete or part, takes place before the contract is reduced to writing and signed.

Mr. Seider himself testified at page 1010 the artist may be recording while the paper work is going back and forth.

Also, according to Mr. Seider, Spector, the producer on the original album, did not have a written contract when he engaged in all the production activities on theoldies album in 1973. He didn't get a written contract until 1974.

Now, the second point I want to make is that Mr. Levy testified that he and Seider did discuss reducing the oral agreement to writing but that Seider asked him to wait until the Beatles' settlement was signed because that would mean more money for John Lennon.

Now, Mr. Seider admitted at page 2038 that he told Mr. Levy that the Beatles' settlement would mean more money for John Lennon, but Mr. Seider was either unable or unwilling to explain on the witness stand why he would have given Levy such confidential information,

unless he was having a business conversation with Levy.

I submit that the Court can draw appropriate inferences from Mr. Seider's refusal to explain why he would give this important bit of information to Mr. Levy, unless it was in the context of a business discussion.

The final point, and I think the most important in terms of deciding whether an oral contract, an enforceable oral contract, was made on October 8th, his Plaintiffs' Exhibit 11, which is the transcript of the1973 Come Together settlement. Now, here was an agreement,your Honor, which covered in part the leasing of three masters for an album. The agreement was presented to your Honor by two knowledgeable music industry lawyers, including Mr. Graham of the Marshall, Bratter firm, who represented to the Court that this was the fully enforcement agreement.

I submit that at this point the Court should refer to that agreement, to Plaintiffs' Exhibit 11, to determine what terms were considered essential in such a contract in order to make it enforceable, and I think you will find if you look at the agreement, at the transcript of your Honor, there was no reference to duration, there was no reference to territory, there was no reference to specific royalties, it did not name the masters that were to be included, there was nothing about the title of the album,

there was nothing about the approval of the lacquer masters, nothing was said about the price of the album, nothing was said about advances, nothing was said about pressing, and I could go on and on and list all the boiler plate that I think is so dear to Mr. Grumbach's heart. None of that was in in agreement that was represented to this Court as being a fully enforceable agreement.

Now, with this framework, your Honor, let me get some of the key aspects of thiscase and try to present them in a somewhat chronological fashion. I obviously don't intend to cover every point in the case, or we would be here for the next two weeks, but I will try and hit some of the highlights.

We start out with the proposition that when Mr. Lennon released Walls and Bridges as his next album without including three Big Seven songs he breached the terms of the October 1973 settlement agreement. Now, maybe he had an excuse for doing that, maybe had an explanation, but you heard Mr. Seider testify that the release of the Walls and Bridges album was done deliberately and that no one took the trouble to obtain Big Seven's consent under the settlement agreement, even though the Spector tapes had come back several days before the Walls and Bridges album was started.

Big Seven complained of the breach in a formal letter from its lawyer, Mr. Krasilovsky. In response to the letter a meeting was set up at the Club Cavallero on October 8th.

Now, everyone agrees that the principal participants in the discussion on October 8th were Mr. Levy, Mr. Lennon and Mr. Seider. Mr. Kahl and Miss Pang played lesser roles. Mr. Bernard Brown, who I think was referred to by one of the defendants' lawyers in his opening statement as a "disinterested witness", admitted in his testimony that he did not participate actively in the business discussion, which may explain why Mr. Levy and Mr. Kahl had trouble remembering his presence at that meeting.

Let me just make two comments about Mr. Brown and Miss Pang. You will recall that when Mr. Brown testified in his direct he had a very specific recollection of everything that happened on October 8th. He remembered the exact time when he landed at Newark Airport, he remembered he went to the hotel, he went to the record plant,he went to Lennon's apartment, he went to have dinner at Benihana, he went to a meeting at Club Cavallero. He had a specific recollection of everything that happened on that date. There is only one problem with his recollection. I think the airline schedules that we presented

to you showed that what he did was physically impossible. There is no way he could have left Los Angeles at a reasonable time in the morning of that day and done all the things he did because of the three hour time difference.

Now, what does this prove? All that it proves in my opinion is that Mr. Brown is either a liar or he has a very selective memory, he remembers those things he wants to remember, even though the meaning didn't mean anything to him at that time, he doesn't remember anything else. Now, I don't think I have to belabor Mr. Brown, because everybody pretty much agreed he did not participate in the business discussion.

His only substantive contribution in his testimony was to say that Seider and Lennon told Levy that it would be impossible to get the EMI consent, and both Mr. Seider and Mr. Lennon have denied that they said it would be impossible. On the contrary, they have testified that they told Levy that it would perhaps be possible. So I don't think we have to pay much attention to Mr. Brown's testimony. If your Honor thinks he is a significant witness, I can elaborate on all the inconsistencies in his testimony, but I don't think he adds much to thecase.

Now, what about Miss Pang? Well, Miss Pang,

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again, she is a charming young lady, but she has a very selective memory. For example, she testified that during this entire meeting which lasted two and a half to three hours, she couldn't remember a thing that Mr. Seider said. She had rightly no recollection of Mr. Seider saying anything even though Mr. Seider and Mr. Lennon testified at length as to all the things that Mr. Seider did say.

The other thing that Miss Pang for some strange reason couldn't remember was the fact that every one sat there exchanging tieles of songs. Now, if there was one point that people, including Mr. Brown, remembered about that meeting it was that they were busy exchanging song titles back and forth. Miss Pang had no recollection of it. So again, I don't think Miss Pang's testimony is very helpful one way or the other.

We are left basically with the testimony of Mr. Levy and Mr. Kahl on the one hand, Mr. Lennon and Mr. Seider on the other hand. There is no question that there are certain internal inconsistencies between Mr. Levy and Mr. Kahl. There are similar internal inconsistencies between Mr. Lennon and Mr. Seider. I think that is to be expected. When four people try to remember what happened at a meeting many months or even a year and a half ago there are bound to be inconsistencies in their recollections and the question

is how significant are these inconsistencies.

THE COURT: Let me ask you this:

MR. SCHURTMAN: Yes.

THE COURT: I assume, I think it just goes without saying at this point, that the plaintiffs' case stands or falls on the question of whether there was a contract reached on October 8, 1974.

I am putting that a little too broadly. I mean the question of the existence of a contract, we are talking about whether a contract was made that night, are we not?

MR. SCHURTMAN: Yes.

THE COURT: And if it was not made that night, there is no later occasion where it was filled out or concluded, right?

MR. SCHURTMAN: No, we --

THE COURT: Is the answer no?

MR. SCHURTMAN: No, I agree with your Honor, except with one qualification.

THE COURT: All right.

MR. SCHURTMAN: And that is that subsequent performances, subsequent statements by the participants, should have a bearing and in my opinion do have a bearing on whether a contract was reached or not.

THE COURT: I agree completely. After we have all gone over all the evidence, the framework in my mind is this, Mr. Schurtman, that the question before me on this phase of the case is whether there was a contract entered into on October 8th.

MR. SCHURTMAN: That is right.

THE COURT: Now, transactions before October 8th, transactions after October 8th, are circumstantial evidence of what was done on October 8th.

MR. SCHURTMAN: Right.

THE COURT: But it is the October 8th date, that is the occasion where the plaintiffs claim the contract was made, right?

MR. SCHURTMAN: Correct, your Honor.

THE COURT: Okay. I am sure you are going to do this. I agree with you that when it gets downto the testimony about the October 8th meeting the crucial witnesses are the four you have mentioned. I want you to go ahead.

I have questions particularly about Mr. Levy's testimony, but why don't you analyze it. You continue in your own good order.

MR. SCHURTMAN: All right.

THE COURT: I assume you are going to take up those witnesses, right?

MR. SCHURTMAN: Absolutely.

THE COURT:Okay.

MR. SCHURTMAN: Let me first focus on the areas where I don't think there is any substantial disagreement on what happened. Perhaps there is, but I don't think so based on the evidence.

The first point is I think the parties are in substantial agreement that the purpose of the October 8th meeting was to discuss the non-compliance with the Come Together settlement and what, if anything, should or could be done about it.

I think this is even admitted in paragraph 32 of the undisputed statement of facts.

The second area of agreement is that the parties all agree that Mr. Lennon explained insome detail what had happened to the Spector tapes.

The third area on which there begins to be some slight disagreement is that Mr. Levy and Mr. Kahl testified that there was a discussion about a payment of a couple of hundred thousand dollars to cure the breach and that Mr. Levy said that would not be enough.

Mr. Levy and Kahl said they explained why the Come Together settlement was worth more to them, because of the enhancement of thecatalog, publishing rights, sheet

music, and so forth.

Mr. Lennon and Mr. Seider both admitted that Mr. Levy had said at the meeting he was out of pocket, and in fact Mr. Lennon remembered the figure of $250,000 coming up, because of Lennon's failure to comply with the October 1973 settlement agreement. So I don't think there is too much disagreement on that point. The parties phrase somewhat differently what happened.

Now, according to Mr. Seider's testimony, Lennon told Levy that he was disgusted with the oldies album at this point, that he had lost all interest and desire to complete the album, that he felt that the rock and roll nostalgia phase had passed and that he was worried about the critics' reaction if the album was released through normal retail channels, and this is pretty much confirmed by paragraph 40 of the statement of facts submitted by defendants.

There is disagreement between the parties aso to who first suggested the possibility of a TV promotion, did Mr. Levy bring it up first, did Mr. Lennon bring it up first, but there is no dispute that the idea of selling this album by television was raised at some point and that the parties began to discussit very actively.

Mr. Levy told Mr. Lennon that he had a company which specialized in TV mail order promotions and several

witnesses have testified, including Mr. Seider, that Adam VIII was specifically named as the company at that meeting.

THE COURT: Who has testified that Adam VIII was named?

MR. SCHURTMAN: On the Adam VIII naming, let me check.

THE COURT: I think it is two and two. I guess Levy and Kahl testify it was mentioned, Lennon and Seider deny it.

MR.SCHURTMAN: No, I think Seider said that Adam VIII was mentioned. Let me just check through my notes on that.

I am told that May Pang also said it was mentioned, but let me check Seider's.

THE COURT: Yes, you are right. May Pang said that Levy asked if they had heard of Adam VIII and May Pang answered yes and Levy said "That's me."

MR. SCHURTMAN: Mr. Seider testified at 2008 that at the time of the October 8, 1974 meeting he knew that Levy had a company known as Adam VIII and he knew that Mr. Levy's company, Adam VIII, had a TV marketing.

THE COURT: If you try to think of the absolute bare minimim of terms that would have to be agreed

upon to make a contract, I would think probably it would have to be agreed who was the party who was going to do the recording and the distribution, in other words, who would Lennon and Apple be contracting with, would they be contracting with Levy, would they be contracting with Big Seven, would they be contracting with Adam VIII.

MR. SCHURTMAN: I would submit --

THE COURT: Mr. Levy and Mr. Kahl certainly both testified that Adam VIII was mentioned as the party who would perform and pay the royalties, but I thought it was basically that any such mention was denied by Lennon and Seider. If Seider admitted it I have certainly missed something.

MR. SCHURTMAN: I think the agreement itself was made with Big Seven, because Big Seven was the injured party under the Come Together settlement, and they hadn't even gone in with the idea of a TV promotion.

THE COURT: Look --

MR. SCHURTMAN: But in discussing --

THE COURT: No, no. I don't feel I am being too technical. I don't go along with the defense that all the things they say had to be in the agreement. I do not agree with them, and I will say that right now, and I have tried to think in my own mind what would be the necessary

terms if you were to have an oral agreement.

Now, as long as you are on Adam VIII, I believe, Mr. Schurtman, that in order to have an oral agreement you would have to either have an explicit or expressed understanding as to who the contracting parties are.

MR. SCHURTMAN: The contracting --

THE COURT: And I think here it really couldn't be implicit because you had Mr. Levy and you had -- I guess Mr. Levy has various corporation and I think you would have to say who it is that is going to pay Mr. Lennon the royalties and who it is that is going to have the right to distribute. I would think that would be an essential term. Do you disagree with me? Unless it was so obvious it was understood.

MR. SCHURTMAN: The essential term was that one of Mr. Levy's companies would distribute the album by television. The discussion at the meeting was that the company which does the distribution in the Levy group of companies is Adam VIII. That is the way it came up.

THE COURT: Okay.

MR. SCHURTMAN: But I think the agreement itself --

THE COURT:I get your contention.

MR. SCHURTMAN: The agreement itself was

between Big Seven on the one hand and Lennon and Apple on the other.

THE COURT: I am not so concerned about that. I am concerned about having it specified who would be obligated under this contract. In other words, if you say there is a contract, well, there is somebody to sue, right.

MR. SCHURTMAN: Right.

THE COURT: Somebody to look to for enforcement, and who was Mr. Lennon going to look to for payment of his royalties, responsibility for his royalties, who would have the right to distribute the records?

MR. SCHURTMAN: I think the rights were given to Big Seven.

THE COURT: Who was to pay Mr. Lennon's royalties?

MR. SCHURTMAN: That is our position.

THE COURT: What?

MR. SCHURTMAN: In the first instance, Big Seven would be liable for that.

THE COURT: That is contrary to Mr. Levy's testimony.

MR.SCHURTMAN: No, because what Mr. Levy testified, and I am speaking from memory, is that the understanding was that ultimately Adm VIII would do the

distribution and would make the payments. But that is where you get the assignment or the transfer of rights from Big Seven to Adam VIII.

Now, I assume that if Adam VIII distributed the records and had failed to pay Mr. Lennon his royalties Mr. Lennon could have gone against Big Seven under the terms of the October 8th agreement.

THE COURT: We get confusion. Look, I don't mean to catch you up. I mean, there are lots and lots of aspects to this case and I don't expect you to have everything that I bring up, you know, at your finger tips.

I just want togo back,and you might consider this. I am repeating. I believe that in order to have a contract at that point I think -- I believe it would have to be agreed upon as one of the bare minimum essentials, Mr. Schurtman, I think it would have to be agreed upon who would be the party who would pay Mr. Lennon his compensation and who would be the party who would do the distributing of the records. Obviously that would be one and the same party, I would assume,normally.

Now, was it going to be Mr. Levy personally --

MR.SCHURTMAN: No.

THE COURT: -- was it going to be Big Seven, was it going to be somebody else? Mr. Levy apparently is

associated with several corporations. We have heard the names of at least three, Roulette, Big Seven and Adam VIII.

Now, I believe in fairness to you that Mr. Levy testified that he told the people at that meeting that Adam VIII would be his marketing company and would pay the 12 percent royalties to Lennon. So Levy's testimony, if believed, would take care of that point. I will say that to you.

MR. SCHURTMAN: As I understood --

THE COURT: And Mr. Kahl testified that Adam VIII was mentioned as being the company which would handle the distribution. So Mr. Kahl's testimony would take care of that point.

But I don't recall any confirmation of that from any other witness. I am just citing this as an essential and it is one on which, as I understand it, there is a divergence, as there is in many cases, between the two sides.

MR. SCHURTMAN: Since Mr. Seider and Mr. Lennon have, in any event, denied that any sort of deal was made, you would not expect to find them testifying that it was agreed that Adam VIII would make the payments.

THE COURT: Right.

MR. SCHURTMAN: The most we can look for,

most we can hope for in their testimony or the testimony of their associates is that Adam VIII was discussed as being Levy's marketing arm for TV promotions. I shouldn't say Levy's marketing arm. The company owned by Mr. Levy or partly owned by Mr. Levy that does TV marketing.

THE COURT: Okay.

MR. SCHURTMAN: And Seider and Pang both confirmed that Adam VIII was mentioned as the marketing arm.

THE COURT: All right. We will leave that. I will make a note to check.

MR. SCHURTMAN: But I thought that the question your Honor addressed to me, and perhaps I misunderstood it, was who was the contracting party, and my understanding is that Big Seven was the contracting party in the first instance.

THE COURT: Let's just pause on that now.

Mr. Levy certainly had the power to contract on behalf of both Adam VIII and Big Seven, did he not?

MR. SCHURTMAN: Yes, he did.

THE COURT: I wouldn't think anybody would dispute that.

Why do you tell me that Big Seven was the contracting party?

MR.SCHURTMAN: Only in the sense that when the meeting started it was a meeting between Big Seven on the one

hand and John Lennon and Apple on the other.

THE COURT: Because Big Seven had the rights under the settlement.

MR. SCHURTMAN: Right, and when they decided to work out the settlement and in effect entered into what we call a novation, Big Seven, which had been a party to thenovation --

THE COURT: I agree that Big Seven would be a party to the novation, but is there some confusion about where Adam VIII was a party to that agreement that night or wasn't it?

MR. SCHURTMAN: I don't think the parties spoke in those terms, your Honor.

THE COURT: If they didn't I don't know how there is a contract.

Look, Mr. Schurtman, it seems to me that at the very least in order to have a contract you got to know at the time who the parties to the contract are. If there is confusion about it, if there is uncertainty about it, you don't have a contract.

MR. SCHURTMAN: There is no uncertainty. We have a contract, we say, between Big Seven on the one hand and John Lennon and Apple on the other hand.

THE COURT: Then I don't think there is a

sufficient contract. Where does Adam VIII get into it?

MR. SCHURTMAN: Because Adam VIII was the designated company for performing the functions under that contract.

THE COURT: I think you have got to reckon with the fact that your position is that the parties went out of that meeting with a contract. That means that if your side had breached John Lennon would have had a right to sue that other side, right?

MR. SCHURTMAN: Right.

THE COURT: You are saying there was a contract?

MR. SCHURTMAN: Absolutely.

THE COURT: So John Lennon would have had a right to sue somebody. I think it is important to figure out under your thesis who John Lennon would have had a right to sue.

MR.SCHURTMAN: Until December 11th he would have had the right to sue Big Seven.

THE COURT: And Big Seven only?

MR. SCHURTMAN: At that point, I would say yes. AfterDecember 11th, when an assignment was made to Adam VIII, at that point he could also sue Adam VIII.

THE COURT:Okay. I think that is a little bit

contrived, frankly, because --

MR.SCHURTMAN: Your Honor --

THE COURT: -- I don't know anybody would do it that way. You see, the whole defense position is they didn't really get this far to think about these controversies, but you are saying that they did, they thought enough about it to make a contract,and I am trying to see your position, but frankly, if you wouldthink about it enough to make a contract, I don't know why you would make it the way you say, I don't know why you would contract with Big Seven when it was Adam VIII who was going to pay the royalties and Adam VIII is the marketing company. Big Seven isn't a company you contract with to sell -- if I were John Lennon I wouldn't sell my rights to Big Seven, I would sell it to Adam VIII. It makes a difference.

MR. SCHURTMAN: Why would it make any difference to him initially?

THE COURT: Because Big Seven isn't even in the business. Big Seven publishes sheet music.

MR. SCHURTMAN: At that point Big Seven assigns its rights to Adam VIII.

THE COURT: Then he would have to discuss that.

MR.SCHURTMAN: And the payments came from

Adam VIII.

THE COURT: I would want to discuss that. I want to say "Look, am I contracting with Big Seven and is Big Seven going to assign? How do I know Big Seven is going to assign?" It would be discussed.

MR. SCHURTMAN: It was discussed, your Honor, to the extent that everyone at that meeting understood, if we believe Mr. Seider's testimony and Miss Pang's testimony, everyone at that meeting understood that if there were a TV promotion the company that would handle it would be Adam VIII.

THE COURT: I wish your assistants could find me Mr. Seider's testimony on that point, because I don't have it.

MR. SCHURTMAN: I just cited one portion of Mr. Seider's testimony before. Let me read it again. 2008.

THE COURT: But that was not about a discussion, that was about preexisting knowledge, isn't that right?

MR. SCHURTMAN: Preexisting knowledge as of October 8th, yes.

THE COURT: All right. I am talking about a discussion, Seider testimony about a discussion of the matters we are talking about.

MR. SCHURTMAN: No, for that we have

Miss Pang's testimony.

THE COURT: All right. At least that's clear.

Okay. I get your position. Let us go on to the next point.

MR. SCHURTMAN: All right. The next point really gets me into a discussion of the rights that could be granted by Lennon and Apple.

Now, Mr. Levy has testified that when he went into this meeting he had three things in mind. He had in mind the negotiations he had with Alan Klein for a Beatles' TV package during which Klein told him that Apple had the U.S. mail order rights.

He had in mind the interview with Klein that he had read where Klein had made two points, point No. 1 that when he renegotiated the EMI-Capitol agreements in 1969 he got the boys more money and he got the boys control over their product in the United States.

And finally, the third point that Mr. Levy says he had in mind was that Mr. Lennon exercised a great deal of influence and that if Mr. Lennon wanted a particular album to come out, even if EMI or Capitol didn't like the album, he could at least persuade them to make the album come out. But I think that third point was a lesser point. The main points that Mr. Levy made were his conver-

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sation with Mr. Klein and the Klein interview.

Now, according to Mr. Levy, he did raise the point with Mr. Seider and Mr. Lennon about whether he could get the U.S. mail order rights.

THE COURT: Why don't you get volume 1 in your hands and let usjust go over some of this.

MR. SCHURTMAN: Okay.

THE COURT: What I have as the reference for Mr. Levy's testimony on this business of the rights, I have got pages -- well, we have a reference on 150, a very brief reference, we have another reference on 167, and we have a reference on 170 and 171. I think those are the only three references. I think that's about it onMr. Levy's testimony.

MR. SCHURTMAN: On his direct testimony?

THE COURT: Yes. How do you get a contract out of that, an agreement?

But let usput it in a framework just for a moment. On this point it would seem to me, just putting it in very general terms, that somebody who had the authority or the ownership of the rights to distribute Mr. Lennon's records would have to convey those rights to Mr. Levy. I guess that's phrased in the most general way possible.

Now, where is it in Mr. Levy's testimony which

indicates that such a thing was done on October 8th?

MR.SCHURTMAN: You mean that he was specifically told that he was given the rights?

Well, Mr. Levy testified that he brought up the subject of rights.

THE COURT:' Where are you now?

MR. SCHURTMAN: I am at page 167.

THE COURT: Okay, let's go to that page.

MR. SCHURTMAN: Let's look at that.

THECOURT: Look, let's go back to 150. Are you with me?

MR. SCHURTMAN: I am.

THE COURT: The middle of the page, Mr. Levy's testifies. "John Lennon at that point was very much enthused about the project."

Then I asked "What did he say," and Mr. Levy testified "He says he loves it, he is going to do it."

Then I asked "What else?"

Mr. Levy said "At that point Mr. Seider said 'You know, there is some permission needed.'"

Now, I think you fit in the testimony at 167 and the way I would fit it in would be that you go on and take up with the testimony at 167, line 12:

"Mr. Seider stated we got to get permission from

EMI for the foreign for sure. He was not sure about the American rights, if he needed permission or not."

Then Mr. Levy goes on and says that "You don't need permission in the U.S. for mail order with the Beatles," and so forth.

Now, where is th[illegible] according to Mr. Levy's testimony -- oh, the final thing, Mr. Lennon says, and I am referring to both 150 and 168, Mr. Lennon says something to the effect, according to Mr. Levy, "My contract expires in January of next year, of 1976, EMI is not going to turn me down for anything I ask for."

Where in that testimony is there an agreement or a concession on the part of Lennon or Seider or both of them that would indicate an agreement regarding the bestowal of rights?

MR.SCHURTMAN: May I ask your Honor to move on to the bottom of page 175?

THE COURT: Okay.

MR. SCHURTMAN: Where I ask Mr. Levy the following question:

"Q Mr. Levy, you testified to the Court that at one point you said to Mr. Seider that it was your understanding that Capitol do not have the mail order rights in the United States, that Capitol's consent was not necessary, and

you then went on to another topic.

"Did Mr. Seider or Mr. Lennon respond to what you said, and if so, what did they say?

"A Mr. Seider said he believed that was right as far as the United States was concerned, but as far as the rest of the world was concerned, he felt permission was needed from EMI.

"Q Was anything said on the subject of retail fulfillment centers, whether permission was needed?

"A He didn't think it was. He thought it might be, but he didn't think it was needed at all."

It was at that point that Mr. Levy again picked up the area that you had opened up in your questioning, and if you take that together with his prior testimony and with his statement that at the end of the meeting a deal was made, but that it was still expected that Seider would check with EMI, it is our position that based on all that, when Mr. Levy understood that the deal had been made, he understood that there was no problem as to U.S. mail order rights, that these had been granted to him, but that foreign rights were still left open, Seider had to check with EMI, and retail fulfillment center rights were left uncertain at that point, but that on U.S. mail order rights there was no further disagreement.

Now, I think what happened in context, your Honor --

THE COURT: I don't want to quibble about this, but I have a problem with that testimony on 175 and 76.

In the first place, Mr. Levy purported to cover that subject three times and he hadn't said this very crucial language on 176. Then you asked him, you know, if he said anything else and then he brought this up about Mr. Seider replying. So I guess I have some question of credibility.

MR. SCHURTMAN: You hadn't asked him that question, your Honor.

THE COURT: What?

MR. SCHURTMAN: I don't believe you asked him the question. In other words, I was examining Mr. Levy in sequence and at that point you became interested in one phase of it. You questioned Mr. Levy about it, as you had every right to do. He answered your particular questions and then I picked up where he had left off.

THE COURT: I just said "Go ahead."

I said "What else did he say?"

Page 150. I wanted to get everything on that subject, and he didn't mention any concession by Seider.

167, the witness simply was asked -- he was trying to recall this whole discussion and then he volunteered,

he said, at the top of 167, "There was something I left out. Can I go back?"

And I said, "Of course you can."

I said, "Go back."

Then he recited the discussion with Seider about EMI.

He did not at that point -- and at the end, without telling about any concession from Seider on 168, I said, "What else was said," and the witness said "We made arrangements to meet the next day."

MR.SCHURTMAN: Read on.

"We made the deal."

Now, what would they have made the deal on if everything was left open?

THE COURT: Okay. I have to wrestle with the questions of credibility.

Let us take 167. Let us assume that Mr. Levy is correct, that Seider said that. You know, this business of the rights of EMI and Capitol is just crucial. Are we going to say that we have a contract because of a representation by Mr. Levy and Mr. Seider saying "I believe you are right as far as the U.S. is concerned." Is that the necessary thing that makes a contract?

MR.SCHURTMAN: Well, the necessary thing is the

testimony that follows, that they made a deal. Now, at that point, if you believe Mr. Levy that the parties said that they made a deal, the question is what would they have made a deal on if the question of consents was still left open, and we say that based on this testimony and based on the other testimony in the case what they made the deal on was the U.S. Mail order rights, and once Mr. Levy had stated his position Seider and Lennon agreed with him on that point.

THE COURT: I would like to just think rather carefully about what would be necessary in the way of agreement or meeting of the minds, or whatever you want to call it, about the question of the rights, so to speak.

Now, I don't even know how to frame it and I have been struggling with this and it is not easy. You have two contracts whose terms or whose meaning is in dispute here. So the underlying documents, the meaning is disputed. You have got people coming into a meeting and obviously they don't represent Capitol, they don't represent EMI, so they can't give away Capitol and EMI rights. So that is a complication.

Let us assume that these documents have ambiguities, questions of interpretation. Are they going to want a kind of on the spot make an interpretation and reach an agreement as to what the interpretation is?

MR.SCHURTMAN: May I answer that?

THE COURT: I am just really searching. I don't know what you would do under those circumstances to make an agreement in light of that setting.

MR. SCHURTMAN: May I answer that point?

THE COURT: Yes.

MR. SCHURTMAN: In the first place, I don't think there are any ambiguities in the underlying agreements. I think the agreement between Apple and Capitol is perfectly clear on its face, that there was a reservation of mail order rights.

Now, you have heard hours of testimony that mail order rights are the same as club rights. Well, I think on that point you have to consider several things. In the first place, the contract doesn't say so. The contract very clear puts mail order rights into Article III, Section 1, and it has a completely different clause about club rights in Article IV, Section 7. If the two terms were synonymous then it is very strange that they use different terms in the differetn articles.

In the second place --

THE COURT: Then why did Seider say at the beginning of this conversation, why did he say -- let us look at 167. "He raised a question."

MR. SCHURTMAN: Yes.

THE COURT: "Mr. Seider said we've got to get permission from EMI for the foreign for sure, but he was not sure about the American rights, if he needed permission or not."

So if it was all that clear to Seider, if he simply regarded this as an unambiguous situation, why would he, according to Levy's testimony, raise a question? And if he raises a question is he going to go simply satisfied by some assurance from Mr. Levy? Does that make sense?

MR.SCHURTMAN: Yes, your Honor, it makes sense, because in my opinion there was no problem as to mail order rights, there was a rpoblem as to --

THE COURT: Look, you may --

MR. SCHURTMAN: Let me explain.

THE COURT: We are talking about a meeting on October 8, 1974. The documents weren't there. They were talking. I don't know when the last time was that Mr. Seider had looked at those documents, but they were talking there.

It isn't the same as you and I talking in court, where we have, as you say, hours and hours of testimony, we have legal briefs, we have the documents to look at. We might conceivably come to some definitive resolution

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of the meaning. I don't know where we would or not. But that wasn't the setting on October 8th.

I go back to you and I want you to analyze this very carefully. According to Mr. Levy's own testimony, Seider in effect raised a question.

MR. SCHURTMAN: Right.

THE COURT: About the U.S. rights. I refer to 167.

MR. SCHURTMAN: Yes, yes, and I am suggesting to you, your Honor, that the question was not about mail order rights as such, and it doesn't say so on page 167.

THE COURT: But it isn't limited.

MR. SCHURTMAN: The question was about the retail fulfillment rights, because if there is an ambiguity in this field, and I have wrestled with the ambiguity in other cases, it is whether when you talk about mail order that incorporates retail fulfillment or not, because retail fulfillment in the view of some music industry lawyers is analogous to retail music stores. Other people say retail fulfillment is something completely different.

Now, if there was an ambiguity, that is what the ambiguity was addressed to and not to mail order rights as such.

THE COURT: Can we just think. I guess we have

all been involved in real estate situations where, for instance, I might be discussing with you buying your land. Now, you might be perfectly willing to sell me your land, but just as a matter of course we always wonder whether somebody has rights to it, right, and that is the reason for title searches and title insurance. Maybe some taxing authority has a levy on it, maybe there is a mortgage on it. All those things are very familiar to people dealing with real estate, right?

Now, let us suppose that you do indeed want to sell me your rights to the land and I want to buy the land. Now, the way it is done in that setting is you make an agreement subject to a title search, right, and if I just off the cuff tell you "Mr. Schurtman, there is just no problem, that old mortgage has been satisfied, that real estate tax is paid, forget it," well, I wouldn't be apt to do that and it wouldn't mean a lot, we would have somebody go and search the title.

MR. SCHURTMAN But --

THE COURT: And we really wouldn't even purport to sit around and make a final agreement. You can't give the mortgagee's rights away. You wouldn't even think you could. You couldn't satisfy me just sitting around orally without the presence of the documents. You wouldn't

think you could and you wouldn't try to.

Now, that is what I am wondering about here, whether anybody really thought they could contract.

MR. SCHURTMAN: Let me suggest to you an analogy that's closer to home and that was the Come Together settlement before your Honor in 1973.

Now, at that point the defendants or at least Mr. Lennon agreed to use his best efforts to cause one of the Apple companies, and they didn't even specify which one, there was some confusion as to which Apple company it would be, to cause that company to lease certain non-Beatle masters to Big Seven. Now, nobody raised a question before your Honor, "Wait a minute, does this Apple company have the right to leave the masters, do they have to get EMI's consent, do they have to get Capitol's consent?"

That question was not raised before your Honor, and yet the parties purported to enter into an enforceable agreement.

When music industry people talk there are certain questions --

THE COURT: Look, look, let's just follow that. I got Exhibit 12 in my hand.

MR.SCHURTMAN: Don't look at 12. Look at 11, because 12 is not the agreement. 12 is an internal letter

that was written by Marshall, Bratter to John Lennon to cover themselves. That wasn't before your Honor.

THE COURT: I thought that 12 was the agreement.

MR. SCHURTMAN: No, 11 is the agreement.

THE COURT: Okay. I have got 11.

MR. SCHURTMAN: 11 is the transcript.

THE COURT: I thought 12 embodied the terms of the agreement. It is signed.

MR. SCHURTMAN: 12 embodies Mr. Graham's understanding of the terms of the agreement and he wanted to get a written confirmation from Mr. Lennon. But the actual agreement, the one that Big Seven was a party to --

THE COURT: Okay, let's look at the transcript.

"The settlement agreement reached is as follows: John Lennon agrees to record three songs belonging to Big Seven Publishers on his next album."

That doesn't require a title search. You determine which songs belong later and if Mr. Levy tenders songs that don't belong you don't record them.

MR. SCHURTMAN: I am not talking about the first part. I am talking about the master license, which starts on the next page, where it says "John Lennon will use his best efforts to cause Apple, which is a composite of various

corporations, to license" --

THE COURT: It is a best efforts thing.

MR. SCHURTMAN: Right, "to license to Big Seven three songs from the Apple non-Beatle catalog currently in circulation."

THE COURT: You see, isn't that the difference? This settlement in court was a carefully drawn thing. They used the proper caution and the representatives of Lennon weren't -- I guess they weren't representatives of Lennon. But there wasn't any commitment on behalf of Lennon to do something he had no right to do. It was a best efforts thing.

MR. SCHURTMAN: That part is correct.

THE COURT: Okay.

MR. SCHURTMAN: But passing the best efforts thing, then they left everything vague. They couldn't agree on whether an advance had been agreed upon. One lawyer represented to you that an advance had been agreed upon. The other law said "Oh, no, there is no agreement on that point. Let's leave it open." They couldn't agree on the rights. They finally said "Well, whatever Big Seven's customary rights are." They left one point after another open and invariably referred back to whatever the practice may be.

THE COURT: Okay. That is another point. That is another point. I am trying to focus very carefully on this business of what you would expect to happen if these parties at that October 8th dinner really contracted about the rights or whether they could contract about the rights and even believed they could contract about the rights.

MR. SCHURTMAN: As far as the mail order rights are concerned, if you believe Mr. Seider that, first of all, he didn't think there was a reservation for mail order rights as such, even though he had drafted the agreement, if you believe that, then obviously he would not have granted the mail order rights or agreed to let Lennon or Apple grant them at that meeting. On that point I think Mr. Seider's testimony is simply incredible.

The man who negotiated the agreement, Alan Klein, who was Mr. Seider's superior, said that one of the big coups that he made in negotiating this agreement was to reserve all mail order rights and that mail order rights were definitely not the same as club rights.

THE COURT: Let us suppose Mr. Seider thought there was a question about it. Would he resolve that question at that meeting once and for all, would he simply say "Okay, Mr. Levy, I am satisfied, Alan Klein told you this, you have read Playboy, that's enough for me"? Would he do

that?

MR. SCHURTMAN: If he honestly thought that Apple had the mail order rights, yes, he would.

THE COURT: Okay. I guess it is a question of what you make out of the evidence. I guess that if he was firmly convinced, in other words, if he read the contract literally and he believed that there were mail order rights that Lennon and Apple could convey, I guess he could sit there and say "Yes, we conveyed them," and then it would depend on what the documents meant back home.

It is really a question for me and I won't plague you with this. I think the question for me is this: Was this a question that Seider raised and did he really resolve it there or didn't he?

MR. SCHURTMAN: I think the question that he raised, as I said before, had to do not with mail order rights as such, but with the retail fulfillment rights, whether they are part of mail order rights or not, and I think that question was pinpointed later in the testimony at page 176, where the question was put to Mr. Levy:

"Q Was anything said on the subject of retail fulfillment centers, whether permission was needed?

"A He didn't think it was. He thought it might be, but he didn't think it was needed at all."

Now, I agree with you. That point was definitely left open, because nobody was certain what the answer was. Foreign rights was definitely left open. But the U.S. mail order rights, I don't think Mr. Seider raised a question as to that.

THE COURT: Okay. I guess we have done all we can.

What about this business of whether there was an agreement -- let us put it this way: What about the question of what rights were, you know, agreed upon to be conveyed, whether it was just mail order rights, retail fulfillment, foreign, or all three or one or two or three?

MR. SCHURTMAN: Your Honor, we have consistently, despite what defendants have told you, taken the position that what was agreed upon at the October 8th meeting was that the U.S. mail order rights would be conveyed unconditionally, that the retail fulfillment rights and foreign rights would be made available only if EMI consented on the foreign rights, and that the question of retail fulfillment problem was clarified and resolved.

Now, it is true that in our pleadings and in subsequent documents whenever we simply alleged the agreement in broad conclusory terms we said worldwide rights, and the reason for that was that according to Mr. Levy

in November and December Seider told him that it was not necessary to seek EMI consent and that Mr. Levy concluded from that that Mr. Seider had told him that retail fulfillment and foreign rights were also available, that the conditions had been met.

THE COURT: My question on this phase is kind of -- let's call it the other side of the coin. I want to depart for a moment from this question of getting consent, not getting consent, in other words, the legal requirements, and I want to get into the point of whether they agreed to do business in this way.

Now, my problem is this, that in reading over Mr. Levy's testimony you have a very emphatic statement, and he really testifies to this two or three times, because he as asked to go over this, he testifies two or three times emphatically that he described at that meeting the marketing through retail fulfillment denters, and then you have testimony on -- there was a little confusion because I think your questioning was focusing on the time and Mr. Levy was emphasizing this retail fulfillment and at 157 I asked him to go back and I said "Please" -- well, at a couple of points I asked him to cover everything he said about marketing, mail order, retail fulfillment, and so forth, and beginning at 156 I think he gives his most comprehensive testimony about

the whole subscription and he says that "While we were preparing for the retail fulfillment it was good to run with the mail order and that was hlepful for the second campaign, if you did the retail fulfillment," and so forth, but much, much emphasis on the retail fulfillment.

The testimony as to what was agreed upon on the other side is in very general terms. He says "Mr. Lennon said he would do it, we have a deal," that kind of thing.

Now, where is it that would permit me to construe the deal as being limited to mail order? I think in order to do that, I mean, somebody would have to say, wouldn't they, "Look, I have told you all about retail fulfillment, but the only way we can do business right now is mail order," and the other side would have to say -- well, I think you would have to think and say something explicit, "Well, we have talked about a whole lot of things here, but all we are agreeding to do business on now is mail order."

Where is that statement?

MR. SCHURTMAN: I think you have to pull it together from different bits of testimony.

THE COURT: What?

MR. SCHURTMAN: And the testimony is that, according to Mr. Levy, there was a deal made, that there would be no problem with U.S. mail order rights, that the other

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two types of rights were conditional and subject to later clarification and consent.

THE COURT: That is just a discussion of the legal requirements. That doesn't necessarily mean that John Lennon is going to accept an exclusive contract where all he gets out of Levy is mail order.

MR. SCHURTMAN: Are you asking me whether it was discussed or what the practicalities would be, because the practicalities would be that Mr. Lennon could make at least $600,000 just by mail order campaign, which is more than he made on the album that Capitol sold for him. Capitol so far has sold only 400,000 albums in the United States, according to Mr. Levy's testimony.

THE COURT: That is shifting the ground. I am talking about there that night. Where is it that indicates that the parties delineated and they ended up in saying "Although Mr. Levy has all these possibilities, I John Lennon am willing to go with you solely for mail order."

Where is it that spells it out?

MR. SCHURTMAN: Your Honor, I cannot find any testimony where Mr. Lennon specifically said "I will go with you solely on mail order." That I don't have in the record.

What I have in the record are the following points, and all I can say is that if you are trying to determine whether there was or was not an oral agreement, those are the points that have to be pulled together.

Point No. 1, that U.S. mail order rights can be granted, but that the other two types of rights are open, are left conditional.

Point No. 2, that we have a deal.

Now, if you believe that the parties said, "Okay, we have a deal, let's go to work, let's get started," if you believe that, and that is a question of credibility, then the question is what was the deal on. Well, the deal could only be on the part where they agreed that no further consent was necessary, to wit, the mail order rights.

Now, would it make sense for the parties to just want to go ahead on mail order rights alone? On that one they say yes, it would make sense, because Mr. Levy did explain that mail order packages alone can make a lot of money. Now, they can't make as much money as packages which also include retail fulfillment and foreign. But even a mail order package by itself, which is not unusual --

THE COURT: Where does he explain that mail order by itself makes a lot of money? I don't get that from his testimony.

MR. SCHURTMAN: What?

THE COURT: I don't get any delineation or any estimate of mail order sales separately, I don't get any indication of mail order possibilities separated.

MR. SCHURTMAN: At page 1861 Mr. Levy made that point very specifically. The question was:

"Q Is it feasible and practical to promote a record album on television?"

THE COURT: I have in mind that testimony, but I want to know if there is any evidence that at the October 8th meeting he gave a separate discussion, in general terms or specific terms, of the business possibilities of mail order.

MR. SCHURTMAN: I think he discussed both together. He discussed mail order and he discussed retail fulfillment.

THE COURT: As part of the TV selling, right?

MR. SCHURTMAN: As part of the TV selling.

THE COURT: Okay.

MR. SCHURTMAN: You want me to continue on that point or move on?

THE COURT: Anything more -- this is crucial.

MR. SCHURTMAN: There is no testimony in the record as far as I know, unless I have overlooked something,

where Mr. Levy said in so many words "Now, gentlemen, you can do it by mail order, you can do it by retail fulfillment, you can do it by both. Since you have the mail order rights to convey to me but you have to get EMI's consent on the foreign rights and the question of retail fulfillment is still open, let us specifically sit down and make a deal on mail order and leave the other two points open."

Now, maybe he said it, maybe he didn't, but he certainly didn't testify that he used those precise words. We don't know what the precise words were that the parties used because everybody is testifying as to their general recollection.

I suppose it would have been easy enough for Mr. Levy to sit on the stand and go down the list of things that he said precisely, and if he had done that I think your Honor would have assumed he is lying, as I would assume with any man who can testify exactly what he said a year ago. I think any man who does that, unless he has a photographic memory, is lying.

So the best that Mr. Levy could do in testifying, and in testifying honestly, was to give you his general recollection of what was said, and his general recollection was that they did discuss mail order, they did discuss retail fulfillment, they did discuss foreign rights, they did come to

the conclusion that mail order was available immediately, that the other two points would have to be left open, and then they shook hands and they said "We have a deal," and from that he concludes that he had a deal on mail order rights only, until a later point, when Mr. Seider told him things which led Mr. Levy to believe he also had the other rights.

Now, that is the best we can get from this record.

THE COURT: Okay. I think what I would like to do is to just take a very short break. I have some questions I want to pose to the other attorneys.

The things I have brought out to you, Mr. Schurtman, they are the crucial questions in my mind on your case. I think on the events that happened later I have a number of questions of the other attorneys and maybe I could just go to them now, after we take our break.

(Recess.)

THE COURT: Who want to lead off for the defense?

MR. BERGEN: I will, your Honor.

I would like to start off, your Honor, by stating , not that it is relevant to the argument, but Mr. and Mrs. Lennon are both ill today. Otherwise they would have been here.

I would like to address myself first to the plaintiffs' memorandum of law that they served on us yesterday -- it is dated February 3rd -- and specifically to their point 1.

First of all, they refer on page 4, actually page 5, the top of page 5 --

THE COURT: Excuse me just a second.

MR. BERGEN: It is entitled "Plaintiffs' Memorandum of Law," dated February 3rd.

THE COURT: All right.

MR. BERGEN: It makes certain references to citations from Mr. Levy's deposition transcript.

First of all, those citations don't support the proposition that they are cited for. Further on on page 5 they say that Mr. Levy testified that subsequently Mr. Seider told him that it was unnecessary to seek EMI's consent, and they cite three pages from Mr. Levy's deposition. The only problem with that is that it is in direct conflict with Mr. Levy's trial testimony, because at page 167 Mr. Levy testified that Mr. Seider told him he had to get permission of EMI for sure. At 171 Mr. Levy said that Mr. Seider said that on foreign rights --

THE COURT: Wait a moment. What is it that is in contrast with --

MR. BERGER: The statement on page 5, it says Mr. Levy also testified that subsequently Mr. Seider told him that it was unnecessary to seek EMI's consent, and they cite the three pages of Mr. Levy's deposition.

Mr. Levy's trial testimony is the exact opposite. At pages 167, 171, 176, Mr. Levy says that Mr. Seider told him he had to get EMI's consent for the rest of the world, for the foreign rights.

Page 290, in a telephone conversation in November, Mr. Levy says that Mr. Seider told him he still had to get clearance on foreign rights.

At page 319 Mr. Levy says that he and Mr. Seider had not really worked anything out about foreign rights, that John Lennon would have a lot more flexibility on foreign rights, but in all honesty he didn't say I got them yet.

At page 1805, in response to a question from your Honor, where you asked Mr. Levy "When you came out with this album in February did you believe that you had the right to market it outside let's say North America or outside the United States," and Mr. Levy responded, "Mo, based on what Alan Klein told me and other things,no."

1832, in response to another question from your Honor, you asked him "Why did you write the letter the

way you wrote it with respect to worldwide rights," and Mr. Levy said "Because I believed t deal we made, I was getting worldwide rights when it was finally put down in writing."

And your Honor said to him "Did you believe that you had worldwide rights?"

Mr. Levy said "That I had them already so I could go and market another country?"

And your Honor asked him "Yes, I mean that," and Mr. Levy answered "No."

Now, the letter that is also referred to, which is Exhibit 31, of January 9, 1975, as referred to on page 5 of this memorandum, was written, as Mr. Levy admitted in response to your Honor's question, when Mr. Levy knew that he did not have the worldwide rights. Yet the letter says in accordance with the agreement reached during those negotiations, John Lennon has recorded 16 sides which I will market throughout the world by use of television advertising." That was not a true statement. By Mr. Levy's own testimony, it wasn't true.

Again at page 5 the plaintiffs say that Mr. Levy based his claim on worldwide rights, but again that is not what Mr. Levy's trial testimony is. His testimony is that Mr. Seider told him very clearly that he had to

get EMI's permission.

And this false statement, which started in the letter of January 9th, was carried through into the State complaint, into the bill of particulars, into the federal complaint, the affidavit that Mr. Levine signed in support of their motion for a preference in the State Court, in the answers to Apple's first set of interrogatories, in the amended complaint in this court, and in plaintiffs' own statement of disputed and undisputed facts.

Now, on page 6 they try to just brush that off by saying "Accordingly, the pleadings in all documents, including an affidavit which set forth the October 8, 1974 agreement in broad conclusory terms, simply spoke of worldwide rights without spelling out any detailed distinction."

That's the whole problem. They were asked in the bill of particulars to set out in detail what the agreement was. They were asked in the answers to interrogatories to set out in detail what the agreement was.

Mr. Levy was represented by lawyers. They knew exactly what they were putting down on those pieces of paper. To suddenly turn around now and say that wasn't the deal at all, there were certain little conditions, there were certain things left open, that is not what they have been telling us since the beginning of this case. They

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specifically did not spell out any detailed distinctions.

Then on page 6 they go on to say that subsequent conversations with Mr. Seider and Mr. Lennon led Mr. Levy to believe that these other rights had also been granted. Again, that is in conflict with what Mr. Levy has testified to here at the trial.

THE COURT: Excuse me. I am interrupting your argument, but I think we established this. The State Court complaint was not specifically verified by Mr. Levy, right?

MR. BERGEN: No, it wasn't, your Honor. But Mr. Levy testified that he reviewed it.

THE COURT: Just one step at a time here.

MR. BERGEN: Yes.

THE COURT: He didn't verify the bill of particulars, there wasn't any process like that, right?

MR. BERGEN: No, there wasn't.

THE COURT: But in his deposition he swore that he had read and approved, right?

MR. BERGEN: That is correct, your Honor.

THE COURT: Let's see. We have the affidavit of August 11, 1975. The answer to interrogatories of September 1975, were they sworn to by Mr. Levy?

MR. BERGEN: Yes, they were, your Honor.

THE COURT: Could I see those? Do you have those?

MR. BERGEN: My copy is not -- that is Exhibit AS?

THE COURT: Is that AS? Where is AS?

MR. BERGEN: In fact, it is AS-1. It is interrogatory No. 37, your Honor, and I believe it starts at the top of one of those pages towards the bottom of AS-1.

THE COURT: Okay. I think I have enough on that. I get your point.

Can we go to something else?

MR. BERGEN: Mr. Schurtman keeps talking about people saying "We have a deal, we have a deal," like there is some magic in those words, that once somebody says "We had a deal" there is naturally implicit in those four words all sorts of provisions, agreements, et cetera, that haven't been discussed before. I think the evidence in this case is very clear that there wasn't a deal. The parties didn't discuss the details. Mr. Seider has testified that it was his understanding of the agreement that you couldn't do anything without EMI's permission.

Going specifically to the October 8th meeting -- and Mr. Prettyman is going to deal in more detail with that

meeting -- we all know that Mr. Levy maintains that a deal was made that night, but the problem arises when one tries to determine what the deal was and what were its terms, and that takes us back again, and I wouldn't go into it any more, to these various statements and allegations in pleadings, in bills of particulars, in affidavits, answers to interrogatories, statements of undisputed and disputed facts, all of which point to this worldwide rights, a deal for world-wide rights, and it is our position that this change in the deal, which occurred virtually at trial, because the plaintiffs mainta ed right up through their statement of disputed facts that the deal was a worldwide deal, really raises a serious question as to Mr. Levy's credibility, because having been told time and time again what his claim was, on trial the claim suddenly changed and Mr. Levy has virtually abandoned his complaint and every other assertion of his claim, including two made under oath.

Now, this can't be a question of Mr. Levy repeatedly mistakenly misstating his claim. It happened too often.

THE COURT: Mr. Bergen, I am acutely aware of that. What would help me I think is to explore with you some problems I have from the standpoint of your side.

Now, one of the basic things that I have been

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wrestling with, obviously, is the question of the accuracy and veracity of the different versions of what went on at that meeting and later events.

Now, I guess it is pretty obvious from my questioning of Mr. Schurtman that I have got some serious questions about whether there was a contract, even if I believe every word, you know, if I credited Mr. Levy's version a hundred percent, and I won't labor that any more. I have gone over that with Mr. Schurtman. But let us try to explore all sides of this and let's just assume for the moment that an agreement could be made out from Mr. Levy's testimony, just for the purposes of argument, and let's assume that it is crucial for me to resolve the conflicts between the versions of Levy and Kahl on one hand and Lennon and Seider on the other.

Now, I have got to wonder what is it that tips the scale. Of course, you don't have to tip the scale in your favor because you don't have the burden of proof. But how far can I get the scale up in your clients' favor, what is it that makes their testimony more believable than Mr. Levy's?

I wasn't there, you weren't there, and it is really two people's word against another two people. Why would I accept your version rather than another version?

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MR. BERGEN: It is our position that Mr. Levy has changed his version.

THE COURT: I have that in mind. Let us deal with another thing. You see, there are some things that I have problems about regarding both Mr. Seider's testimony and Mr. Lennon's testimony. I don't understand it. Mr. Lennon was asked why he recorded 15 or 16 songs. Why did he record 15 or 16 songs? Did he just pick those? Is that a normal number you picked?

MR. BERGEN: Your Honor, I think Mr. Lennon's testimony was clear that on most of his albums the number of songs he recorded are about 10, that in some of the Beatles' albums they would record 14.

THE COURT: When did the Beatles last record them?

MR. BERGEN: I believe '68 or '69.

THE COURT: Let us look at Mr. Lennon's testimony, 1914 and 1915.

MR. BERGEN: I have it, your Honor.

THE COURT: I wish he simply had been asked, "Why did you record 15 or 16 songs?" That was the real intent of the questioning. And he ends up by saying the Beatles' practice was to report 14 songs on a side in England.

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Let me ask you, Mr. Bergen, what do you contend is the reason for recording 15 or 16 songs?

MR. BERGEN: I really don't know what his reason was. I don't contend that he particular had any reason. Mr. Lennon testified that it really does not make any difference the number of songs, that the really important thing is to keep each side of an album down under 20 minutes, because it is important to him how loud the sound level is.

THE COURT: Well, if you were reading over this record and you had testimony by Mr. Levy and by Mr. Kahl, there was discussion about the number of songs.

Mr. Levy suggested 20, Mr. Lennon suggested nine or ten, and they compromised it at 15 or 16. Then you have the fact that Mr. Levy records 15 or 16. Wouldn't you be drawn to the inference that he recorded that number because of that agreement?

MR. BERGEN: I don't think there was an agreement.

THE COURT: Is there any other explanation in the record at all as to why he recorded 15 or 16 songs? Can you point to any other explanation?

MR. BERGEN: No, I can't, except that there was clear testimony from Mr. Lennon that up until January 29

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he was still thinking about the possibility of putting this album out on television.

THE COURT: Who was going to do that?

MR. BERGEN: He also testified, I believe, that Mr. Levy was the frontrunner, but there was not any deal that Mr. Levy was going to do because it was understood that EMI's permission had to be gotten.

THE COURT: A case is a matter of little blocks. I want to focus on this little block.

Why did he do the 15 or 16 songs? I guess we don't need to labor it. YOu say you don't know why he did. I don't know why you don't know why he did.

MR. BERGEN: There was no testimony as to why he did, but I can assume that having thought of doing an album, and if you believe Mr. Levy's testimony, and I don't know whether Mr. Lennon testified about this point or not -- I just don't know. Mr. Levy wanted 20 or so songs, which is his normal album on television, and Mr. Lennon, I can imagine, saying, "That is too many because you are not going to have enough space to fit all those songs in," and if the figure 15 or 16 was mentioned, Mr. Lennon might have had that in mind when he went into the studio, that that was the limit that he could do. As it turned out, he finally eliminated two of the tracks, one, because the

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album was running over 20 minutes.

I think the Rock and Roll album put out by Capitol, one side is just approximately 19 minutes, and the other about 17-1/2 minutes. The other reason he testified to was both of the songs that he eliminated, Angel Baby and Be My Baby, those had been recorded with Mr. Spector with 28 musicians in a situation of chaos in 1973, and it just didn't sound right. He couldn't get them in tune, so he dropped them out.

THE COURT: How many did he actually put on the tape before he dropped off Angel Baby at the end?

MR. BERGEN: Well, he recorded all of the ones in Mr. Levy's album, the ones that are on Mr. Levy's album. If we can look at the album cover we can tell.

THE COURT: Why two?

MR. PRETTYMAN: Because of the medley.

MR. BERGEN: There are two songs squeezed in one track.

THE COURT: 16 sons, and two of them are in a medley.

MR. GRUMBACH: There are two medleys. Only one is reflected on the Roots album. One is Reddy Teddy and Rip It Up. The other medley is Bring It On Home To Me and Send Me Some Loving.

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THE COURT: How many songs are on the thing?

MR. BERGEN: It says that there are 15 tracks on this album. Track No. 5 on Side 1, which is Rip It Up is a medley. And that is about a minute and 39 seconds, I think. And Track No. 3 on Side 2 is Bring It On Home To Me, but that is a medley, too.

There is another song that is fitted into the track. Those two songs are in a separate band on the record. So you have 15 tracks, and what Mr. Lennon eliminated just before he finished or he was ready to cut the lacquer or master, was Track No. 6 on Side 1 of the Roots album, and Track No. 5 on Side 2 of the Roots album. Those are Angel Baby and Be My Baby.

THE COURT: I just lost you. You have got on the Roots album 15 tracks?

MR. BERGEN: That is correct. Two of those are medleys.

THE COURT: So you got actually 17 songs?

MR. BERGEN: That is right.

THE COURT: Arranged the way we spoke?

MR. BERGEN: That is right.

THE COURT: Let us pass that for a moment.

You have, as I understand, got four non-party witnesses who testified that Mr. Lennon said to them at

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various times, "I am making a record or an album for Morris," or, "This is Levy's album," or something like that. That is Masucci, Chapman, Crocker, Sheresky, and, of course, you got the testimony of Levy and Kahl that they heard these things. But I am leaving Levy and Kahl aside, because they are associated with the plaintiffs.

Now, Mr. Lennon either denies those flatly, all such statements, or says he does not recall them. This is a classic problem of credibility. Are these people lying? Is Mr. Lennon correct in disputing the testimony of all those four or six people? How do I resolve that?

MR. BERGEN: We have also got three non-party witnesses, two musicians and May Pang who were at the farm that weekend and testified they never heard Lennon say that to Mr. Lennon, despite the fact that Mr. Levy said it was said at the roundtable. Just as Mr. Schurtman could have brought in more witnesses, I could have brought in more musicians.

The plaintiffs never bothered to take all their depositions. They would have all testified to he same thing. I spoke to them.

THE COURT: One answer to that is that if you got a group of people in an atmosphere like that, they are not all going to hear everything. I think it is

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perfectly conceivable that Mr. Masucci heard something that Davis did not.

MR. BERGEN: He testified they were at the dinner table.

THE COURT: But they were not all listening to each other. The dinner table was a big table. I get your point, but I am still left wondering. First of all, I don't remember the testimony of Davis and --

M. BERGEN: Mottau.

THE COURT: And Mottau. I found them perfectly credible. They never purported to say, "I am sure I heard everything that was said at the dinner table." I gather this was a fairly big table.

MR. BERGEN: Mr. Levy's testimony is they were talking about it all the time, and, furthermore, Mr. Kahl's testimony was in direct conflict with his deposition.

THE COURT: Yes, I recall that.

MR. BERGEN: We read from Mr. Kahl's deposition where he said he didn't hear anything.

Then we get to Mr. Chapman. Mr. Chapman says that he heard that Mr. Lennon said to him in front of the fireplace that he was doing this record for Mr. Levy. Mr. Kahl's testified that he heard Mr. Levy say that to Mr. Chapman in front of the fireplace, not Mr. Lennon.

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THE COURT: I don't know that there is much we can do in discussing it. I just wonder. I do not just think they would be lying to me, Masucci, Crocker, Sheresky. Are they so much in the control of Levy that they would come in here and perjure themselves?

MR. BERGEN: Assume for the sake of the question that Mr. Lennon did say that, what does that have to do whether a deal was made on October 8, when all other indications point to the fact that there was not a deal made.

THE COURT: It has weight in one way, and maybe not so much weight in another way. It goes to credibility. And if I should believe that Mr. Lennon and Mr. Seider were slanting their testimony on certain points because of their interest in the case, the question I got to wrestle with, naturally, is what other points are they slanting their testimony on. In other words, it's very important to me on the question of credibility to know whether witnesses are telling the truth on points, even though maybe they are not the major break points of the case. I don't say it is a major break matter whether Mr. Lennon said, "I am making this for Morris" or not.

I agree with you. It could be just an expression of optimism, an expression of hope. But if he

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is coming in to court and if he is not giving me an accurate picture on it, what about the accuracy of his statements as to October 8. If you were in my shoes you would worry about that, too.

MR. BERGEN: If you take even Mr. Levy's testimony on October 8, assuming that everything he says is true --

THE COURT: You are not addressing yourself to my question. You were an advocate for your clients. I understand that. I am telling you this is my problem, and it is not a small problem. It is not answered by referring to Mr. Levy's testimony. I am talking about your clients' testimony, and I want to know how much of that I can trust, putting aside all the rest of the case completely. I just wonder about that and wonder about that denial of those four witnesses. I don't know there is much more we can say about it. It bothers me.

MR. BERGEN: I think there are witnesses on the other side, too, as I already pointed out.

THE COURT: Now, another thing -- and I brought this up at the trial -- I have never felt that I was getting the complete story about what was going on in the minds of Seider and Lennon as far as their view of this deal. I am concerned about the fact that they never told Capitol any-

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thing about it. I am concerned about the fact that no answer was written to Mr. Levy's letter of January 9. If I got that letter claiming a contract with me and if I didn't have a contract, I would get to my secretary so fast with a letter back to Levy denying that. I know I would have a messenger practically at the door carrying it there. It is inconceivable to me that that was not done. Isn't that an admission maybe there was a contract?

MR. BERGEN: I don't believe it is. Maybe he should have responded to the letter, but Levy told him he was going to send him a letter in the telephone call, and Mr. Seider said, "You do whatever you want to; there is not any deal." Maybe he should have responded to the letter.

THE COURT: He has no real answer. He testified when he was called by Dolgenos he did not answer the letter because he waited for a copy, and when he got the copy he didn't answer because there was no reason. Do people just let letters go for no reason unanswered? What was he doing with Mr. Levy at this time? He was still trying to keep this thing open, wasn't he?

MR. BERGEN: I think his testimony was he had a meeting with Mr. Coury on the 9th of January and he discussed the possibility, and Mr. Coury said, "I want to

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hear the tape," and Mr. Seider's testimony is he kept Mr. Levy informed. The next thing that happened after Capitol heard the tape, the tape being sent out from New York to California, Mr. Seider had a meeting with Mr. Menon and Mr. Coury and they again discussed the possibility of doing this deal, and Mr. Seider's testimony was that the Capitol people told him, "We think this album has got great commercial possibilities and we don't think it should be released over television; we think it should be sold in the normal retail manner."

And Mr. Seider's testimony is he told Mr. Levy about that conversation. He also told Mr. Levy that very shortly the Capitol people were going to come to New York to make a presentation to Mr. Lennon because Mr. Lennon as the artist involved was the one to be convinced that the album had commercial possibilities through the normal selling methods that are used on all his albums.

THE COURT: Let us just take a moment and focus on the events after January 9. What is Mr. Levy's version? Can you refresh my memory on that? Let us just try to get the two versions.

MR. BERGEN: I am not sure that Mr. Levy testified at all about what happened after January 9 until he got this telephone call, or he had the meeting with

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Mr. Seider. I don't believe Mr. Levy even testified he got a call from Mr. Seider on the 29th.

THE COURT: He testified about the December 31 letter. He talked to Mr. Seider. His testimony was that Seider said, "It is just a formality. Don't pay any attention to it."

MR. BERGEN: He testified that Mr. Dolgenos told him that, and that he had spoken to Mr. Seider on January 6th or 7th and Mr. Seider said the same thing that Mr. Dolgenos said to him, that the letter is being sent in order to protect John's rights. And then Mr. Levy responded, "Well, I think we got a deal. I am going to send you a letter to that effect."

THE COURT: Let us take it one step at a time. My notes indicate that after the December letter, which was about the Phase 2 of the Come Together settlement, Levy called Dolgenos -- this is Levy's testimony -- and Levy said Dolgenos told him, "If you made a deal the letter does not mean anything."

And Levy responded that the letter made no sense. Levy called Seider and asked him what was happening. Seider said, "The letter means nothing. It is some kind of a formality. Everything is moving along nicely."

Then Levy wrote the January 9 letter and did

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not get an answer. According to Levy, Levy called Seider. He did not get a call or a letter in response to the January 9 letter. Nobody initiated a call to him? Is that right? According to Levy's testimony?

MR. SCHURTMAN: On page 322, that is where he picked it up.

THE COURT: Now, Levy called Seider because he had heard rumors that Capitol was putting out the album. Seider said in a week or ten days he would be in New York with Coury and they would work things out. Seider said Capitol was not putting out the record. And then you have the January 29 or 30 --

MR. SCHURTMAN: Your Honor, on page 323:

"Q Did you tell Mr. Seider that you had heard rumors that Capitol was putting out these masters as an album?

"A Yes.

"Q And what did he say?

"A It is not happening. . ."

THE COURT: That is what I said.

Now, let us get Seider's version. Seider says that Levy called him about the December 31 letter. Seider says that Levy asked if it meant Seider would not go to EMI. Seider said that he just wanted to make certain

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that Lennon's rights were not prejudiced with regard to the settlement. And then Levy said, "I am going to have to send you a letter."

Seider told Levy to do what he wanted. Levy said he had a deal and Seider said there was no deal. This is Seider's testimony, of course. Seider testified he had the January 9 letter of Levy read to him. Seider told Dolgenos he would take care of the letter. Seider was called by Coury. Seider said he told Levy about wanting to meet with Coury. Seider said he called Levy on the 13th of January and told him he met with Coury, that Coury was arranging a meeting and requested the tape, and Levy said that that was bad.

After the meeting with Menon on the 14th Seider called Levy and told him about this meeting. I don't know that it is life and death, but, you see, one version is, in effect, that Levy is saying that far from denying a contract, Seider led him to believe everything was okay, until finally on the 29th or 30th.

Now, a [illegible]son could infer if they had believed Levy's testimony on that that Seider really thought he had a deal, he was trying to keep the deal in being, and it was only after Capitol stepped in and stopped the deal or persuaded the parties otherwise, and finally he goes

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with the bad news to Levy.

Now, Seider's testimony on the other hand is that he continually kept Levy informed of the situation, good, bad and indifferent, and denied a deal and so forth. So just taking this block of the case, it is of interest.

If I am looking at this block of the case, I am wondering who to believe? Who is more plausible? Is it plausible to think that Seider's failure to answer the letter is one thing that is very consistent with Levy's version? Seider does not deny the letter. He does not answer it. Is this consistent with Levy's version that Seider was playing him along?

MR. BERGEN: Mr. Seider said he knew Mr. Levy was going to write the letter. Mr. Levy told him he was going to write the letter saying that there was a deal. Seider told him there was no deal, to go ahead and write the letter. That is entirely consistent. You get the letter and you don't answer it. To really protect himself and nail it down, he should have responded to the letter.

THE COURT: Mr. Bergen, was not Mr. Seider still trying to get Capital to consent to the deal? Wasn't Seider still trying to get Capitol to go along with having the thing put out by Levy?

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MR. BERGEN: That is what his testimony was. He tried to contact EMI. He contacted them in December. He was told he would have to contact Capitol.

THE COURT: That is why he did not answer Levy and denied the contract?

MR. BERGEN: He was trying to get Capitol's permission. He had been told by EMI, "You got to talk to Capitol; you got to get Capitol's consent to get anything on the market.

THE COURT: He was told that by whom?

MR. PRETTYMAN: IN the telephone conversation Mr. Seider testified to. He sayd he got a call from EMI, "If you want to talk to anybody about marketing the Rock and Roll album, you will have to talk to Capitol."

And Seider's response was, "I can't do it now; I am involved in the Beatle settlement." There was Len Wood at EMI and Richard Perry at Capitol.

THE COURT: Perry was the liaison between EMI and Capitol?

MR. BERGEN: He was a Capitol man who apparently had gotten a call from Len Wood saying, "I got a couple of calls from Mr. Seider about the Rock and Roll album. He wants to talk about marketing it. You people better deal with him."

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And Perry gets in touch with Seider and Seider's response was, "I can't deal with it right now because I got the Beatle settlement coming up."

He finally contacted Al Coury about it. They had the meetings. Coury asked for the tape. They then had a meeting with Menon and Brown and Coury, and Capitol told them that they do not think the album should go out on television. Seider's response is, "Well, you got to convince John, because John is the artist and he still does not really feel that the album is commercially feasible in the normal retail fashion."

And that leads up to the meeting with Coury and the marketing people and the promotional people from Capitol on January 28, all of which, according to Mr. Seider, he kept Mr. Levy advised of.

THE COURT: The question is whether you believe Seider, and I get back to saying there are questions of credibility that you got to wrestle with. I don't as a Judge and a trier of the facts start out just believing people or disbelieving them. I got to have a reason. I don't just assume that Seider is correct and that Levy is not. What is it that tips the scale between Seider and Levy?

MR. BERGEN: One thing that I believe tips the

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scale, if Mr. Levy thought he had a deal, why did he sit around from the middle of November with this tape which he claims Mr. Lennon delivered to him in order to put out the album? Why does he do nothing until after he is told by Seider that EMI and Capitol would not give their permission, that they want to put this album out in the normal retail way?

THE COURT: Because Seider has told him the deal settlement is not coming until the end of the year, and we have got a retroactive provision for Lennon, October 1, 1974, but that contract has not been signed, and just keep the thing undercover until the end of the year. That is what Levy says, and it is not all that illogical.

MR. BERGEN: Then comes the end of the year and Levy still does not do anything. He still waits another month.

THE COURT: What do you mean another month?

MR. BERGEN: January 30.

THE COURT: He writes January 9 saying, "I have got a contract."

MR. BERGEN: Why doesn't he do anything with the album?

THE COURT: Because he wants help from Lennon.

MR. BERGEN: He does not ask for help. He did

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not call Lennon until January 30.

THE COURT: Let us face it, if Levy could have had the full deal he would have had Lennon's cooperation in editing and mastering and whatever you have to do, and he would have had Lennon's cooperation in getting the cover. He was waiting for all those things, I would assume, and that was a desperation measure to go off without Lennon's help on these things. That was just nothing but a desperation measure, wasn't it?

MR. BERGEN: I don't think it was a desperation measure. He had been told he did not have any rights. He had been told by Allen Klein.

Secondly, let us go back to the delivery of the tape. Again, Mr. Levy maintains that Mr. Lennon came in and said, "It is finished; it is done; it is your baby."

What did they need from Mr. Lennon then? Is Mr. Levy's position that that tape was finished and it was ready to go out. Mr. Levy denies that he told May Pang on the telephone on January 30 that he wanted Lennon to come and do so remixing, to change the tape in any way.

THE COURT: Wasn't he expecting help from Lennon on the commercial? Wasn't he expecting help from Lennon on the cover?

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MR. BERGEN: I believe Mr. Levy's testimony is that he was expecting Lennon's help.

THE COURT: It is a complicated thing to deal with an argument, but I am trying to address the point you are making, and I think if I gather, a way back, a few minutes ago, you are making some point that brought me to where I am.

We are kind of late. The reason I bring this up, I am doing what I did with Mr. Schurtman, expressing to you my problems. I am not trying to conclusively indicate that I don't trust anybody,but these are just natural questions. Maybe I can hear from Mr. Prettyman little bit on the October 8 matter.

MR. PRETTYMAN: Your Honor, I approach this in a little bit of an unorthodox manner, and I hope you will bear with me. I will try to put myself in the position of judge and jury who for whatever reason somehow are out to seek a valid, enforceable oral contract here. I tried to say what I would have to go through in order to make this a binding, legal contract.

It seems to me the first thing I would have to do would be to ignore three sets of facts. The first is that if this involved a $25 million deal, if this involved one of the biggest stars in the business who was known to

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have exclusive contracts, why did no one to bother to look at the contracts? Why did no one bother to call an attorney right after the meeting? Why did no one bother t write anything down?

I want to draw to your Honor's attention in that regard -- and it bears directly on what you were asking a few minutes ago, Mr. Levy testified in his deposition that he did not contemplate on October 8 ever reducing this agreement to writing. So it seems to me that you are focusing on October 8, and you not only do not have a writing, but you have a mental attitude of the parties, and the whole business about the testimony about Mr. Seider must have come later, after that date, because at that time he was not thinking of putting anything down in writing.

THE COURT: This is the deposition testimony?

MR. PRETTYMAN: Both here and in his deposition. The transcript is 193.

THE COURT: I have got 193. You say that he testified he did not contemplate putting it in writing? I don't see that.

MR. PRETTYMAN: Look at 1662, your Honor. I have it here on 193. Go back to 193:

"We did discuss a written agreement at subsequent meetings. It would probably be reduced to writing

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later on. But on October 8 I did not think of reducing it to writing, Mr. Schurtman."

THE COURT: I see.

MR. PRETTYMAN: If your Honor will make note of the deposition, 181 and 185, and I think 177 --

THE COURT: Yes.

MR. PRETTYMAN: You remember that Mr. Kives of K-Tel said if he and Mr. Levy were going to make some kind of a deal like this package, that he would have required the deal in writing and he also would have required proof in writing of exclusivity. So we can assume here there is something a little odd about the lack of writing.

It is also interesting that although Mr. Levy went to lawyers on a number of other occasions, when Mr. Seider came to see him he apparently did not consult a lawyer or ask him to look at these contracts.

THE COURT: Let us suppose that these men got together and they really wanted and intended in the best way they could that night to make a contract. Let us forget about the statute of frauds. As far as I am concerned the statute of frauds is temporarily on the shelf.

MR. PRETTYMAN: I am with you.

THE COURT: I am concerned at the moment whether

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there was a contract. Now, let's suppose that these men were together and they wanted to make a contract that night and they did not have stenographers to type things up in writing and wanted to make an oral contract. Now, in this setting what would they do? What would they do about this problem regarding Capitol and EMI in the background? Could they do anything? What would you do?

MR. PRETTYMAN: I will tell you exactly what they would do. They would sit there and say, "Now, what are the things we have to agree on? Let's see if we can't agree tentatively this is what the deal is going to be, and then we will make it subject to a condition, and that is, tomorrow we will get our lawyers on the ball, we will look at those contracts, we will make sure we can do this in every respect and that there are no loopholes here. Never mind, my boy, let's see what those contracts say, because we may have problems of exclusivity. At 9 o'clock tomorrow let's get hold of those contracts and se what the deal is."

Your Honor, we don't wait until after a lawsuit is filed before we get our lawyer to look for the first time at what those contracts are.

May I just give you an example of why this was so important. If their view of club versus mail is

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corrdct, that they are different, under the Capitol-EMI contract pressing had to be done by Capitol, even if Mr. Levy got a deal.

Have you heard anything about that in this lawsuit?

6 THE COURT: Yes, I think we heard about it. We heard about it and Mr. Levy said, "I don't care who does the pressing; I will pay for it: I will pay any pressing plant as long as they have the ability to do it."

MR. PRETTYMAN: I think the testimony was a little bit different than that. Mr. Schurtman, I think, summarized things well when he said on the pressing Mr. Levy has indicated that he would have given the pressing to Capitol if it ultimately would have worked out. My recolledtion is that they did not specifically discuss who would do the pressing. And Mr. Levy at 1873:

"Q Was there discussion at the October meeting as to who would do the pressing?

"A No, sir."

I bring this pressing matter up here as only one of the points that you would think people who were interested in the business would discuss, particularly Mr. Levy, who has been in business for 20, 30 years. He would say, "Look fellows, there are a lot of little

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loose ends here."

For example, you know, even if Capitol has rights, does Capitol have correlative rights? And what about EMI?

THE COURT: I think Mr. Schurtman has a fairly good point, that the Come Together settlement was considered to be an agreement. What was the nature of that agreement? That was an agreement for Mr. Lennon to record three songs.

MR. PRETTYMAN: It was the simplest kind of agreement. There was nothing complicated about that.

THE COURT: Maybe that is not a good analogy. I am very seriously concerned -- let me put it this way -- in trying to reason out what you would have as a bare minimum. How would you even phrase the problem?

MR. PRETTYMAN: You would have to have somebody who had the rights to Mr. Lennon's recording convey, license, assign, or do something to bestow those rights on Levy or one of his companies. You would have to do that.

Now I want to come back to my question, and not get back on pressing. But let us suppose they were sitting there, you would say if they really wanted to do this, they would agree on the other essential terms, whether it included pressing or didn't, and then it would

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be subject to a condition precedent and make sure they had the rights they were trying to give.

THE COURT: Let us suppose sitting there they honestly believed, let us suppose theoretically that they honestly believed unanimously that no consents were necessary because Lennon and his Apple company had a provision that permitted them to do this deal.

Now, they could reach a meeting of the minds if they so believed, could they not?

MR. PRETTYMAN: My answer to that is twofold.

Number one, even if you listen to Mr. Levy and Mr. Kahl and disregard all of the other evidence in the case, you don't find them saying that.

THE COURT: That is what I was going into with Mr. Schurtman, and he says that he interprets the testimony of Mr. Levy on page 176 to indicate that Seider said, "At least on mail order I agree we can convey," or something to that effect. Now then, of course, Mr. Kahl t-stified that on numerous times that evening Lennon said Capitol has no TV rights. The problem in even discussing this, of course, is we have conflicting versions, and I am aware of that.

MR. PRETTYMAN: I am trying to stick to Mr. Levy and Mr. Kahl. Mr. Levy admitted that he knew

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on October 8 that Capitol had been instrumental in getting the Spector tapes back, and it was his understanding that at least $90,000 had been spent in getting them back. To say that Capitol had no rights, he knew that Capitol had put that money out. I don't know whether Capitol was reimbursed by EMI or not. But he knew Capitol had spent this money, and yet when you try to pin him down as to what arrangement there was for Capitol, he certainly must assume Capitol was in the picture somewhere. You don't spend $90,000 out of the goodness of your heart. So how could you possibly say that he thought he had an absolute exclusive deal on mail order. And I emphasize exclusivity, because he said it was absolutely essential in the deal that he get it. And does nobody say to Capitol, "Hey, we are sorry, but your $90,000 is down the drain?"

And then your Honor posed the question to him about Capitol, he told you that Capitol was going to be so happy --

THE COURT: Did I pose that question?

MR. PRETTYMAN: I think you did. He said that everybody was going to be happy. Either you or I pinned him down on this. This is 1767, your Honor, he was asked whether he had any understanding here as to how

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Capitol would get its costs back, and Mr. Levy says it was not explained to him how it would happen.

THE COURT: I guess Mr. Levy's argument would be that the only right Capitol had here according to his understanding was to get this $90,000 back, and since that would be taken care of out of Lennon's royalties, this would satisfy Capitol's only right.

MR. PRETTYMAN: Then you get into still the other problem of the royalties and the 12 per cent, and I will get to that shortly.

He did testify here that EMI owned the masters. They were obviously in the picture and they had some rights. He was aware of that.

How were they going to be reimbursed in the deal? What was the oral agreement as to how EMI was going to be taken care of.

THE COURT: I don't understand. I don't know what EMI's ownership of the masters has to do with this? We have those '69 agreements. Doesn't that permit Lennon to make records? Certainly, Lennon can make records and Capitol can distribute them and not get any consent from EMI.

MR. PRETTYMAN: EMI just does not give away its rights in this regard, your Honor. There is a financial

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relationship between the parties so that royalties are paid, and EMI gets -- I am not sure what the arrangements are -- but EMI because it owns the masters, in effect, licenses these in the United States. Does it make any sene to you that it would license Apple, then allow Apple to license somebody else and get absolutely nothing back? That is why Mr. Lennon got so bollixed up with his assignment, because when I pinned him down and said, "All right, now, as I understand it, EMI gives all of its rights to Apple with no strings attached in terms of mail order, and Apple goes out and it makes it all kinds of money on mail order -- you remember his testimony -- and I said, "What does EMI get?"

He said, "Nothing." It makes no sense.

THE COURT: I have got the contracts up here. Where is it that provides that EMI would get something?

MR. PRETTYMAN: I apologize for not having the paragraphs in front of me, but there is an arrangement where EMI does get something. I will look it up and give it to you.

THE COURT: I am interested.

MR. PRETTYMAN: I will.

THE COURT: What I have vaguely in my mind is this, that because of the '69 agreements -- at least, this

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is the plaintiffs' argument -- because of the '69 agreements Lennon could make records, Lennon could distribute them by mail order in the United States. Just for purposes of argument, let us assume for the moment that that mail order covered TV mail order.

Now, with that assumption the plaintiffs would say Lennon and Apple have the mail order rights, and the effect of the '69 agreements is that Lennon could do his own marketing, could have his little own company, could market. And what you are bringing out is a good point. I would just like to see the conditions.

MR. PRETTYMAN: If I can get back to the precise terms that were theoretically agreed to, I am going to assume that they talked only about mail order, that they wanted to make an oral agreement on mail order for the United States.

The first thing that we run into that is vital to Mr. Levy is exclusivity. He testified time and time again that exlusivity was absolutely essential. You could not have two albums out at the same time. Mr. Schurtman told you that exclusivity was part of the contract.

Now, there is a point we can focus on that they certainly would have agreed to that night. Mr. Levy said at the first trial that he made an agreement with

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Lennon and he said in his deposition not with Lennon, but with Mr. Seider, and Mr. Kahl did not recall anything about it at all. But much more importantly, Mr. Levy told this Court in answer to its questions not that the parties agreed to exclusivity, but that they did not disagree, that there was an assumption. That is not a binding meeting of the minds.

THE COURT: Isn't that something that would be implicit?

MR. PRETTYMAN: When Capitol has just spent $90,000 and was planning to use the album itself? That is the very last thing. And it certainly was not explicit on January 28.

THE COURT: That is a pretty good point, Mr. Schurtman. Why would you assume that Capitol would have no rights if Capitol had put in $90,000? Wouldn't that need somebody to check it out?

MR. SCHURTMAN: You may recall there was testimony almost at the end of the trial -- it was either Mr. Lennon or Mr. Seider -- I think Mr. Seider said it in response to your Honor's questioning -- that Capitol does not get anything from Lennon unless Lennon wants to give it to Capitol. He said so in so many words. You pinned him down on that. He said if Lennon does not

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want to give the album to Capitol, Capitol does not get it. There was also testimony -- and Mr. Levy gave tthat testimony in the page following the one that Mr. Prettyman cited to you a few minutes ago -- that the understanding in the industry is that when recording costs have been paid by a company, they are deducted from the artist's royalties, the company gets its recording costs before the artists gets his net, and Mr. Levy said it was his understanding that once the 12 per cent royalty started flowing to Lennon, Capitol's costs would ve paid first.

MR. PRETTYMAN: May I just show you how little sense that makes, with all due respect to my adversary?

Mr. Schurtman told you the other day hat the parties didn't agree on a specific duration of this contract, and Mr. Levy said in answer to my question -- and you remember his statement -- that the CPOs would decide when mail orders would come to an end, and then the discussion went on if Capitol, for example wanted to get into the picture at retail, that they could put out the album later. In other words, you were assuming Capitol has some rights somewhere.

Now, does it make any sense whatever without going to the contracts that these people would somehow agree,

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"Here Capitol paid $90,000. I am going to have an exclusive for so long as I want; it is entirely up to me as to when I stop, and after I have stopped, then Capitol can come along and they can do this thing with the album?" That makes no sense whatever, sir, and you know it boggles the mind.

I would like to move on, sir to the question of --

THE COURT: It is kind of late, and I probably prolonged this with a lot of qudstioning. The oral arguments helps me immensely. I think I benefit. I have suddenly had some time opened up to me tomorrow afternoon. Would it be possible for you to get back?

MR. PRETTYMAN: Tomorrow afternoon?

Your Honor, I am willing to accommodate the Court, but I must say that I cannot come tomorrow. I am being picked up at 8 o'clock and driven to Connecticut, and I have to get back at 4 o'clock and I have a meeting at 6.30. I was going to discuss this in little more detail. I was going to discuss the 12 per cent royalty and how that came out. I was going to discuss the assignment, which I think is extremely interesting, because Mr. Schurtman has said that the assignment was very vital here, because up until the assignment you could only sue Big Seven,

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and after that you sue Adam VIII, in regard to the assignment.

There was testimony by Mr. Levy that he never told them about the assignment and never sent them a copy of it. So we have the whole legal situation changing hands as to who was going to be responsible, who was the party in charge, and the other side was not even told about it. I was going to talk --

THE COURT: Why don't you go ahead.

MR. PRETTYMAN: I was going to talk about price, I was going to tell you what you would have to agree to with -egard to an oral deal of this magnitude, even if the people in good faith and honesty wanted to sit down in an evening to decide this. You would want to know, for example, how long it was going to run, who was responsible on each side, what the method of distribution was going to be, what area was covered.

THE COURT: We spent 12 days on this, and I assume that you all regard this as important. I regard it as important. All cases are important. Now, it is complicated. I don't see why we don't figure out a time to gather and finish.

MR. PRETTYMAN: I can do it any time next week, and I apologize for tomorrow, but I made such complicated

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arrangements.

THE COURT: I don't think we can do this tonight, because I would want to hear Mr. Schurtman. In other words, as far as I am concerned, it helps me to get the positions of the different parties laid out, and it helps me a lot to be able to ask questions. I just think it is too late to finish tonight.

MR. SCHURTMAN: Your Honor, I rise to a point of personal request. Would it be possible to do it the following Monday, instead of next week?

THE COURT: What is the problem with next week?

MR. SCHURTMAN: It is a purely personal problem. Last August I canceled my Christmas vacation with my children because Judge MacMahon said he would be trying the case in December. I promised my children I would take them on vacation next week. If necessary I will cancel it, of course.

THE COURT: Where do you intend to go?

MR. SCHURTMAN: Colorado, your Honor.

MR. PRETTYMAN: I could do this Saturday. One of my meetings is with two judges --

THE COURT: You have no time tomorrow afternoon?

MR. PRETTYMAN: I am being picked up by a limousine by a company that I don't know how to get hold

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of, driven to Connecticut, coming back, and I have a meeting with two judges at 4 o'clock, and I have another at 5.30. So I would not even know how to cancel tomorrow if I went out to phone. But I could do it Saturday or any day next week. I could go ahead tonight for as long as your Honor wants.

(Discussion off the record.)

MR. PRETTYMAN: Your Honor, let us just take a matter you would think would be extremely simple, and that is the question of price. The question of price was obviously of interest if you are going to pay a percentage royalty, something that everybody would be interested in, at how much the albums and tapes were going to be sold for.

Mr. Schurtman told you that the price that was agreed on was an element of the contract, and he said the price of the tapes would be $5.98. Mr. Levy thought at one point that the price was $6.98. Before Judge MacMahon he said, "That was left hanging a bit." He was referring to October 8. "We finally agreed on $5.98."

Mr. Kahl said four times it was $5.98. And I would like to remind you, sir, that Mr. Chapman indicated that they were still discussing price, he thought, at the farm still later, and there was lots of testimony

that they were discussing price at the Graham meeting, all after October 8. So if you take that simple question, you have a lot of ambiguity, looking at it from their side and ignoring the testimony on our side.

Mr. Levy at the trial said that Lennon would take care of Spector and Capitol at one point. In his deposition he said that recording costs were not discussed, but he assumed that Lennon would take care of them. I will pass Mr. Kahl, who does not remember any discussion of the Spector recording costs at all, and I get back to Mr. Levy, who, as I point out, said that Capitol would be thrilled with this deal, that Apple would be very happy because they will be making money on the deal, too.

Then I point out to you that he didn't know how Capitol was going to be taken care of, and as to Apple, whether there would be any payments to Apple as contrasted to Mr. Lennon, Mr. Kahl testified that there was no discussion of Apple at all at the October 8th meeting. And so then we move to EMI, which we already discussed, and in regard to that 12 per cent, your Honor, if you will look --

THE COURT: Is there somebody who can just look at those contracts and get for me what it is the defense is contending?

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MR. PRETTYMAN: What I will do, your Honor, while we are here, I will go and ask for a shorthand expression from Capitol as to exactly how the thing works, because if I sit down with those contracts I will be a day and a week.

THE COURT: Let me see if I have the basic idea. You are saying there would have to be an agreement for Levy to pay a royalty to EMI?

MR. PRETTYMAN: Somebody has got to pay something either to Capitol or EMI. If you are talking about the fact that EMI owns the masters and they are, therefore, entitled to some money, or about the fact that Capitol has paid $90,000, or that EMI has to reimburse Capitol, you have to figure something into that contract to take care of now only the recording costs that have been incurred, but also some kind of royalty or payment for the ownership.

THE COURT: I thought a moment ago when we were talking about the ability of the parties that night to convey rights to Levy, you suggested that they must have realized that Capitol had rights. Then you brought up the EMI situation of the ownership of the masters. Then we got off on what I was asking, what the provisions were. I want to get the thrust of your argument there and I don't

think I have it.

Are you saying that the parties must have realized that night even on United States mail order rights they had to get EMI's consent?

MR. PRYTYMAN: I am saying that is a separate issue. I would say everybody knew they would have to get EMI's consent. That is our version of the case. That is not the point I am making now. The point I am making is they would have to realize that something was going to have to be done about Capitol and/or EMI, that they were already involved, that they already had an interest, even based on the limited amount that they knew at that time, because they knew that Capitol had paid in large amounts of money in getting the Spector tapes back, and these were the tapes that were going toi form the basis of the TV album that they were talking about. Mr. Levy knew that Lennon was under some kind of exclusive arrangement, and he has said that he has recognized all along that EMI owns the masters. And I am saying sitting there that night, it seems to me that the very least that you could conclude -- and I emphasize "least" -- is that they would have to say, you know, we are going to have to find out what everybody's correlative rights are. Obviously, we can't do something all by ourselves and

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pretend that Capitol and EMI do not exist. If we don't check with them or get permission, the least we got to do is check tomorrow who owes what to whom and whether anybody has any additional rights.

It is just too simple to sit here and say that Apple has mail order and forget these other parties. That is what I am saying, sir.

But if I can get back to that 12 per cent, it is all very well to talk about Mr. Lennon going to get 12 per cent, and, of course, he is going to have to pay Spector's royalty, and he is going to have to pay the recording costs and so forth. But then when you take those figures that you discussed at some length with Mr. Levy, and you remember Mr. Graham had a list of figures and we got into a big dispute about whether foreign was involved -- but let's forget about foreign and let's assume we are talking here about those figures as they are set forth on this exhibit, Defendants' Exhibit GGGG, when you start looking at what was to be paid here and again adding up those figures, you do not come out with any 60 cents left for Mr. Lennon out of which he is going to have to pay all these costs, even if Mr. Levy is going to only take a dollar -- you come out with 23 cents for Mr. Lennon, out of which he is somehow going to have to pay out all of this

money, and Mr. Levy said in his deposition, your Honor, that his profit in the United States as compared with Europe was going to be $2.

If you start adding up those figures, everything that he is going to have to pay, and then he figures Lennon to get 60 and he gets $2, you have got a $4.98 album, what I am saying is that it is too simple to sit there of an evening over drinks and say, "John, you are going to get 12 per cent and you take care of Spector and some recording costs and everything else will be taken care of."

You just can't do that, because the figures don't add up. And we proved that they didn't add up when the parties got together later at the Graham meeting and starting talking of the practical ities of the thing, and it just doesn't come together. So when he admits that the entire deal was made on October 8 --

THE COURT: The Come Together--

MR. PRETTYMAN: That is a euphemism.

THE COURT: Mr. Levy says that Exhibit GGGG was a misinterpretation --

MR. PRETTYMAN: I am not going to take your time to go into that, because you sat here and listened to the depositon testimony, and I cannot believe that anybody is going to take seriously the fact that somehow those were

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foreign figures. These people were sitting there just as I think everybody testified to about that meeting, and trying to figure out if they had a deal.

THE COURT: In other words, you are saying Mr. Levy in his deposition indicated that he was discussing these figures either at the first meeting or at the November meeting in connection with the United States?

MR. PRETTYMAN: Sure. It gets a little complicated because he was discussing both mail order and retail fulfillment. Some relate only to mail order and some relate only to retail fulfillment. And he says he did not have agreement on retail fulfillment. It is clear that they related only to the United States.

I was trying to pin down some of the things that I would think that you would have to have in an agreement of this sort. And your Honor said that you don't agree with us that everything would have to be agreed to, and I can appreciate that. There are some things that are boilerplate, but maybe there are some bits and pieces you could have left off and still reach a meeting of the minds, even on a 25 million-dollar deal. But I would think if you would think about it that at least as a bare minimum on a deal of this magnitude with a star of this kind and a thing of this complexity, where under their

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theory you have three contracts, instead of one, you would want to know the duration of it, who precisely were the parties on each side.

As your Honor pointed out, is it Big Seven or is it Adam VIII, that lost $400,000 in one year? Is it Big Seven, the publishing company only?

And the method of distribution. Certainly, you would want to know that. And if it was mail order only, you would want to get the contract area, the area to be covered, whether it is part of the United States, the entire United States, or the world. I think you would want to know what each party had to do and what each party was entitled to do.

Let me give you an example. Did Mr. Lennon simply have to finish 15 or 16 songs, or did he have to present an approvable recording. Suppose he recorded 15 Ya Ya's. They say they have a novation, that as of the end of October 8th the copyright dispute was dead. They had a novation. Are they going to sit here and tell you that if this man had gone out and recorded 15 Ya Ya's and handed it over, that the copyright dispute would be behind us?

THE COURT: He was not going to record 15 Ya Ya's.

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MR. PRETTYMAN: He was going to have to record something that the parties would agree was an acceptable item.

THE COURT: There I think you could agree on a number of songs and you could if you were disposed to trust each other that much, knowing that John Lennon being a discriminating artist and so forth, that the exact terms could be worked out?

MR. PRETTYMAN: Let us move on, then. I think you would want the duties of Mr. Levy in regard to the album spelled out, that is, what he had to do as a minimum matter, in selling and distributing, what he was going to spend on advertising, for example.

THE COURT: What would you need to say on that?

MR. PRETTYMAN: I think you would have to say that Mr. Levy would agree that he would spend at least a certain amount of money in a certain way and that it would have to be part of the agreement, and it would be scley in connection with mail orders, since he claims he does not have rights in relation to retail fulfillment centers, in terms of what the parties would be entitled to do. There would have to be a definitive agreement that Mr. Lennon could approve the jacket and so forth.

In regard to the advance, which is common in

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the industry, they take the position that they did not talk about an advance because it canceled out the copyright dispute. But you would think that that would be an item that would be discussed at some length, because normally John Lennon would expect an advance of great size on this kind of a deal. We would have heard lots of comment about the fact, "Don't I get my advance?

"No, because we are canceling out the dispute.

"Are the two equal?"

And so forth. I think you would talk about permission in writing of the name and likeness, because the statute is very specific in New York, as you well know, about getting permission in writing on name and likeness. And I remind you of the photographs here, the photographer's letter, where they specifically told Mr. Levy that he would be responsible for getting the specific approvals in writing. Dietz did not want to get himself in trouble. I think, as I said, you would want to reach some agreement about pressing, who would do it. You would certainly want to talk about who was going to pay for advertising, manufacturing, the jacket.

THE COURT: Mr. Levy said he did agree as to advertising and the jacket.

MR. PRETTYMAN: I understand he said that he

would take care of the rest of the costs. I would point out to you that when they got down to talking about specifics, about what the costs were going to be, that was at the Graham meeting, not at the October 8th meeting, and what the Graham meeting demonstrates is how complicated and complex that business is, because if it turns out that if all your other costs eat up the price of the album, it is of great interest to Mr. Lennon, and I would have thought that that would have been of interest on the evening when they finally decided on the deal that was made.

THE COURT: What you are arguing is that the conflict in the deposition and the testimony about the costs is before us. I don't have before me his argument, so to speak, as to what he could do out of this $4.98. I wish I had it.

MR. SCHURTMAN: It is there in that last memorandum. It is based strictly on record reference.

MR. PRETTYMAN: We have not had a chance to check that memorandum.

MR. SCHURTMAN: It is a record reference. We did not make it up.

MR. PRETTYMAN: I was handed that today.

THE COURT: I am not trying to put you on the

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spot. Let me ask you this:

Levy testified at the trial that some of the figures in this Exhibit GGGG were not realistic, in other words, that the advertising does not have to be $1.20, that department stores don't always get that much, this and that. I can't remember at the present time. But I guess that is more or less what is embodied in the memo. And if you are getting into the question of what would be economically necessary to make this a viable contract, what do you saywould be economically necessary? Is the 12 per cent royalty economically impossible in ordr to take care of Capitol and EMI and Spector? Would you have to have more? I don't know.

MR. PRETTYMAN: I am making two points:

First of all, may I say if I am going to compare handwritten notes made by a participant at a meeting on the very evening of the meeting with the testimony of one of the parties some time later who realized that those figures do not make any sense, I must say that I would have bias in the direction of the handwritten notes. But let us put that to one side. The point I am making is this, and it is only this:

If you had a $4.98 album with these costs, and, obviously, you are not going to make a profit, you are not

going to be able to pay your 12 per cent. What I am saying is that, therefore, costs, a discussion of costs is of importance and of relevance and is something which the parties would normally be expected to talk about in some fashion at the time they were making the deal.

Now, I am not saying that they necessarily would have to agree to a penny as to what each of the costs were. What I am saying is that when you are trying to determine whether these parties mentally reached an agreement on the evening of October 8th, I would ask you whether Mr. Lennon and Mr. Seider would not go into some detail in terms of what kind of costs were going to be involved, because if they were going to come out too great, either Mr. Lennon was going to get his 12 per cent up front, and the album itself was going to go bust, or he was not going to get his 12 per cent. Therefore, I am simply saying, sir, that is another indication of a lack of serious intent by the parties to reach a meeting of the minds on that particular evening.

THE COURT: Look, on that point, Mr. Prettyman, if the figures would be the way they are in this memo and there are references to the transcript, there would be ample room to pay Mr. Lennon his 60 cents, to pay all the costs and to leave Mr. Levy an ample profit. In other

words, it would not be anything you would have to analyze, because all you would be doing is confirming that there are a bunch of fairly moderate costs and plenty for Mr. Lennon to get his 60 cents, plenty to pay for advertising, plenty to pay Mr. Levy, and I don't want to go into all this rigamarole.

MR. PRETTYMAN: The references to the record are references to the later discussion, not on October 8th.

THE COURT: I know that.

MR. PRETTYMAN: If you say it is also obvious, I would point to GGGG, where he does not get his 60 cents.

THE COURT: It is so late. I would like to understand a little better, because I think this is an interesting point, I would like to understand a little better about the difference between your memo and Exhibit GGGG.

MR. SCHURTMAN: On GGGG under advertising he has $125, and that is only in mail order situations, and in the same computation under Profit To Stores he has $1.50. Now, what he is doing, he is combining a mail order operation and the retail fulfillment operation in the single set of figures. He has doubled up the figures, and that is why he comes out with a wrong result. That is the point Mr. Levy made.

THE COURT: Is that the main difference?

MR. SCHURTMAN: There are minor differences, but that is the main difference; he has doubled up two costs in different types of campaigns and it does not make any sense, I agree.

THE COURT: I have a little different point. If we are trying to figure out something to discuss in the making of a contract, I would say if you are sitting there with John Lennon and Harold Seider and the costs are a problem, and if you all think it is going to make a difference, sure, you will sit around and go over them. But if the general assumption is that there is plenty of money in a $4.98 album to pay Mr. Lennon his 12 per cent, and that is all he is going to get and that is all he care about, and if Mr. Levy knows in his mind that he can pay Lennon his 60 cents and have plenty left over for his costs and his profits, frankly, I don't think you necessarily would have to list the costs. It depends on the circumstances.

MR. PRETTYMAN: Your Honor said if you were Mr. Levy and knew, you would not have to go over it. He knows. He has been in the business. John Lennon has never been in mail order before.

THE COURT: That assumes that Mr. Lennon and

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Mr. Seider are careful enough to say, "Before we agree to have you pay us a 12 per cent royalty, we want you to go over the costs and demonstrate that it will be available to us."

Now, I don't have any reason to believe that they were all that careful.

MR. PRETTYMAN: If you will show me one line of testimony in this entire record or the record before Judge MacMahon or in any deposition where anybody said that, I would agree with you. But that would be another condition precedent, namely, "We will agree to this, but before we do we want to get together at a meeting and have you spell out for us precisely what all these costs are so we can make sure we are going to get what we are entitled to."

He never said that.

THE COURT: I don't think we understand each other. I am going back to the point. You said, well, maybe Levy knows his costs and he does not have to talk about it to assure himself, but, surely, Mr. Lennon and Mr. Seider would have to talk about it, because they would want to assure themselves. Isn't that the point you were making?

MR. PRETTYMAN: Precisely.

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THE COURT: Now, that presumes a degree of carefulness in those circumstances. What is there to say that John Lennon would necessarily say, "Mr. Levy, you never gave me a cost breakdown." Doesn't Mr. Lennon have to say that?

MR. PRETTYMAN: I think if you are trying to guess what really happened here that evening, if you are trying to make sense out of the evening in view of the importance of this point, you would assume that the parties would at least say, "We want a deal, but we are going to have to look into the contracts, look into the permission, and, in addition to that, we are going to want some hard, solid figures about this."

To me it is another condition precedent to any deal eventually coming about. It proves to me, among a lot of other things, that the parties did have a discussion that evening looking toward a possible deal, but that they never reached a meeting of the minds in any number of absolutely essential things that theywould have to reach a meeting of the minds about in order for this thing to be enforceable in law.

THE COURT: I guess Levy testified in his deposition that they did go over costs at the first meeting? Isn't that what he testified to?

MR. SCHURTMAN: In part, your Honor.

THE COURT: That is, of course, a question of credibility.

MR. PRETTYMAN: Because Mr. Lennon does not ordinarily pay his recording costs. This is entirely new for him.

THE COURT: Is there any practice?

MR. PRETTYMAN: I don't know the practice is, but I know in terms o Capitol, he didn't have to pay for the Spector tapes, he does not have to pay for the record costs. They are paid first by Capitol and they are reimbursed if they are made in the United States by EMI.

MR. SCHURTMAN: There is no evidence on that.

MR. BERGEN: Yes.

THE COURT: There is no evidence he does not pay?

MR. PRETTYMAN: This is a wholly new ball game for him. He suddenly is undetaking recording costs which he has never had to undertake before.

THE COURT: The Rock and Roll album, Capitol paid for those costs to the Record Plant and all?

MR. PRETTYMAN: Yes, sir. I got a stack of receipts a couple of feet tall which we did not introduce because we have not gotten to our counterclaims yet.

THE COURT: Is there any question that Capitol paid the recording costs to the Record Plant?

MR. SCHURTMAN: They were entitled to recoup out of Lennon's royalties. There is no testimony to the contrary, as far as I can recall. The only thing that is in the record on what Lennon would pay, he agreed to pay half of the Spector costs.

THE COURT: I do think, Mr. Schurtman, I thought that the record, the evidence shows that Mr. Lennon does not pay his recording costs.

MR. SCHURTMAN: I don't recall.

THE COURT: I drew that inference because there was no contradiction to the statement that he did not pay his recording costs on the Rock and Roll album.

MR. PRETTYMAN: There is something more, if you look at the '67 agreement, there is no provision for costs recoupable out of royalties, no provision.

I would just mention a few other points that would have been mentioned in the absence of a written contract. One is what law is going to control in the event of a dispute. And, even more important, what are going to be the rights in regard to assignments and re-licensing, because you heard testimony that sometimes in these kind of deals you can put out an album in perpetuity

to somebody. Does that mean that by Capitol giving out any rights, that Mr. Levy is going to be able to control this album and relicense it? Suppose he relicenses it to a company which in turn sells it outside the United States? What happens?

THE COURT: I don't understand the relicensing? Wouldn't it be understood, if nothing else was said, that Mr. Levy would market the album himself?

MR. PRETTYMAN: It is a question of whether you lose control of your album. Wouldn't there have been some discussion about the fact that if they wanted Big Seven or Adam VIII to put out this album, that they are not in turn to relicense or reassign or whatever language you want to use, world rights to other companies, too, or for mail order or for retail or outside the United States? That is precisely the problem you get into in the EMI contract. And the reason why that provision is so important, it is all very well to deal with X Company, with whom you are quite familiar, but if X Company begins to give its rights either by license, assignment, or otherwise to some other company, which,in turn, re assigns to some other company, you lose control. And this is certainly something that I would have thought would have been discussed.

THE COURT: This is a silly question, in a way, but let me just ask it explicitly:

I understand the '69 Capitol-Apple agreement, Article 3, the restriction relates solely to club rights, and not to non-club, general mail order rights?

MR. PRETTYMAN: That is not quite accurate. It relates to what we call generally club rights, which includes mail order, but what it does with them is this -- can I just refer to it generally as mail order, instead of club?

THE COURT: Yes.

MR. PRETTYMAN: I will call it either club or mail order. I am trying to tell you it means the same thing. What happens is this, that when it comes to those rights, Apple does not give all of its rights to Capitol. Instead, Apple retains the right to deal with third parties in connection with those rights.

Are you with me, your Honor, up to now?

THE COURT: Yes.

MR. PRETTYMAN: Now, let us suppose that Apple does go to somebody like Mr. Levy and negotiates some kind of agreement. What the contract says as we have always interpreted it -- I want to emphasize the two parties to the contract here are in agreement -- what it means is

that if Apple wants to give rights to Mr. Levy, then all three parties have to agree -- Apple, Capitol and EMI have to agree. EMI must agree because of the assignment clause in the EMI-Apple agreement. Capitol must agree because that is the way that Paragraph 7 is written, namely, that the parties will negotiate. It does not mean that Apple by itself and alone and unilaterally can go out and make a deal. It means that Mr. Klein if he wanted to have some leverage in terms of dealng with third parties, and without this kind of provision, he could not have done it. But once he dealt with third parties, then he would have to get the permission both of EMI and of Capitol to go through with it.

Now, we have not put our witnesses on the stand in regard to this, your Honor. You have not heard from Mr. Lennon or Mr. Wood or anybody.

THE COURT: I just wanted your statement on it. What I don't understand is this:

I have got before me Article 3, Section 1 ii of the '69 Apple-Capitol agreement --

MR. PRETTYMAN: Did you want me to tell you how it came about?

THE COURT: No. The way we have spoken about it in the trial, at least, the way I understood the defendants

thought about it is this -- I think Mr. Seider testified, he called these restrictions?

MR. PRETTYMAN: Yes, because without it all rights would have gone to Capitol.

THE COURT: Everything was granted to Capitol, except what was restricted?

MR. PRETTYMAN: A little different way, that Capitol would get total rights absent anything that was held back. I think that means the same thing.

THE COURT: I think it is. Now, the question is, what is held back?

MR. PRETTYMAN: That is what I am trying to bring out.

THE COURT: Now, the language says to distribute by mail direct to consumers. That is held back?

MR. PRETTYMAN: Right.

THE COURT: Without getting into a lot of complicated discussions about what it is, the thing about negotiated club rights, Article 4, without getting into that for the moment, I just want to know what Capitol's position is as to the meaning of that language, to distribute by mail direct to consumers.

MR. PRETTYMAN: I will tell you. I take it you are asking me for our position, because part of this

is based on the record?

THE COURT: I want to know your position, Capitol's position.

MR. PRETTYMAN: Our position is that the parties negotiated solely about club rights. That is shown by the Gortikov testimony. The parties negotiated solely about club rights. When it came into the hurried days of actually putting down in language what the parties had meant, the lawyers were aware from their past experience that there was a small group of people who were receiving things from Capitol directly by mail, the kind of little catalog things, and because they wanted the same royalty to apply to them as applied to club sales, they used the more embracive term of direct mail sales. They meant the two terms to be synonymous.

It was the lawyers' idea to do it in order to prevent what would otherwise be a small group of people from receiving a different kind of right or discount than they would as to club.

THE COURT: So it is true that something beyond club rights was meant to be embraced in the language to distribute by mail direct to consumers? Is that right?

MR. PRETTYMAN: Except for this, it was meant by the lawyers who put the words in there at the last

minute, but the negotiators who had negotiated about it had never mentioned it.

THE COURT: What you are telling me is that is something beyond mere club rights was referred to in whoever wrote that language?

MR. PRETTYMAN: Right.

THE COURT: Now, is it the position of Capitol that this language refers only to cl ub rights plus that narrow little bad of other things that you mentioned a moment ago?

MR. PRETTYMAN: It refers to everything, but what it does in relation to them is to take that conglomeration of rights and refer it back to Article 4, so that everything that relates to club relates to this broader term.

THE COURT: Let me just pursue that. In other words, you are saying, just taking it one step at a time, referring to Article 3, Section 1 ii, that refers to all manner of mail order rights?

MR. PRETTYMAN: Correct.

THE COURT: But what you are saying is that the implementation or application of that restriction in its entirety is governed by Article 4, Section 7?

MR. PRETTYMAN: Exactly. That is what the parties intended.

THE COURT: That is very helpful. Maybe you presented that before.

MR. PRETTYMAN: We have not had a chance. We never really had a chance to go into it. My witnesses have not been on. But I am glad you gave me the opportunity. I was going to answer one question a little more fully that you asked Mr. Bergen, about some of these comments Mr. Lennon made, but I have taken up enough of your time.

THE COURT: What about that?

MR. PRETTYMAN: I have a version of it, your Honor. I really think that what happened, trying to take an unbiased view of the record, was that John Lennon thought about mail order a long time before October 8. He had that possibility in his mind, and I think that he probably had lost some interest in this album, not as much as portrayed by plaintiffs, and that his interest in the album for mail order was reinvigorated that night, and I do think he began to get excited about it again. And, after that I think that he viewed this album as a potential mail order album, without being very clear in his own mind as to whether it was going to be a Levy album, because all of the problems might eventually be worked out, or whether he would be able to talk Capitol to put it out through mail

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order.

You remember at the January 28 meeting there was Mr. Simon, and there was testimony as to whether Capitol had talked him out of mail order, but it was not mail order with Levy, he did not talk about Mr. Levy, he was talking about why can't this be a mail order package, and Capitol, which had not done this, talked him into seeing that as against him own interests, and it was at that point where he finally let go of the idea of a mail order package. So even if these people at the farm and so forth were telling the truth -- and I must say that Mr. Garlick, who was with these people for a whole week and must have heard hundreds and hundreds of references to this very specific agreement that they made, we noticed that his affidavit is not here, nor his testimony, but, in any regard, passing that, it seems to me that if the question did come up that Mr. Lennon had in his mind making the album for Levy or had in his mind making it for Capitol, primarily in his mind he was still thinking in terms of mail order, and it is conceivable that things of this kind could have been said in terms of what Mr. Levy said in front of Mr. Lennon to others.

MR. PRETTYMAN: You have to know Mr. Lennon is not the kind to refute this and say to his host, "No, Morris,

I am not making an album for you." And I think that is part of it. But I think the most important thing about those comments is this, your Honor, even if Mr. Lennon at the farm thought that he really had a contract with Morris Levy -- and I don't think he did for a moment -- but if he did, it is totally irrelevant if in fact on the evening of October 8th the parties did not sufficiently come to a meeting of the minds about the terms that had to be reached. That is the New York law. He could be under an impression he had a contract, and it does not necessarily make a contract. I don't think for a moment that he did. I think he was ambivalent about the whole situation.

The thing, so far as he was concerned, in he making of the record, maybe it was going to come out on mail order and maybe not. That is as best as I can piece together what happened and how you can account for any statements that you might believe by these third parties.

Unless you have any further questions, your Honor, I will stop.

MR. SCHURTMAN: Your Honor, the last two points that Prettyman made, if I could just deal specifically with those two while they are fresh in your Honor's mind, I think it would help. I don't want to deprive Mr.

Grumbach from making a statement.

Just on the last point, you heard Mr. Prettyman say two minutes ago that Levy was not mentioned at that January 28th meeting with Capitol. I would like to read from Mr. Lennon's testimony, because it squarely contradicts that. This is at page 1918 on cross-examination:

"Well, isn't it a fact that you had the idea of working on this album with Mr. Levy until Mr. Coury talked you out of it on January 28?

"Well, I mentioned Morris was a front-runner for the TV package, I mean, if it was going to go on TV I would have preferred Morris to have it."

So Lennon did tell them he was thinking of making a TV package and Levy was the front-runner.

THE COURT: You are getting rebutted, Mr. Prettyman.

MR. SCHURTMAN: Your Honor, there are many difficult issues in the case, but I think the one issue that should be beyond dispute is that Lennon thought he was making his album for TV; he was, at least, thinking of mking a deal with Levy. And then on January 28 he changed his mind. It seems to me that is one point that we should not have to belabor in the case. God knows, there are enough issues where we have genuine disputes,

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but that one alone I think the defendants cannot deny, that Lennon was thinking of a TV package and thinking of doing it with Levy, and that on January 28 he decided not to. That was the penultimate point.

There is the interpretation of this contract of club rights. He referred you to Article 4, Section 7, but he overlooked Article 4, Section 1.

THE COURT: Yes?

MR. SCHURTMAN: Article 4, Section 1 says that:

"Apple grants Capitol the sole and exclusive right to use Beatles masters for the manufacture of records in Canada and Mexico and to distribute, sell, license, or otherwise use or dispose of such records in any and all fields of use provided that except as provided in Section 7 of this Article 4 below nothing in this agreement shall grant Capitol the right to sell records by mail order direct to consumers."

So, really, Article 4, Section 7 was an exception to the exception. That is what we have here.

I will defer until Mr. Grumbach speaks.

May I say something, since I am the one who seems to be creating these scheduling difficulties, that I truly appreciate your Honor's generosity, and that Mr.

Kanzer could be prepared to continue the argument early next week.

THE COURT: We have gone late now. To have everybody assemble again, I think we will not do that.

MR. SCHURTMAN: I would need about five minutes.

THE COURT: We will hear from Mr. Grumbach.

MR. GRUMBACH: I will be very brief.

You have asked about the credibility of the people on our side of the case, your HOnor, about limited points. I cannot close the argument without suggesting to your Honor that on the plaintiffs' side of the case the credibility question is gross.

THE COURT: Please, I have specific things in mind. There are credibility problems all across the board.

MR. GRUMBACH: Your Honor, going to the precise question of what was discussed as to costs, if you will look at page 1348 of Mr. Kahl's examination, he said as to the meeting with Seider and Graham, which Mr. Levy testified had to do with foreign costs, Mr. Kahl said, page 1348 --

THE COURT: Let me get that.

MR. GRUMBACH: Line 18:

"I had gotten up a few times since I knew they were just talking figures in reference to the John

Lennon package and they were there, I assume, to consummate a deal regarding the costs and what was going to happen in putting this package out."

Now, that is the problem that Mr. Levy was confronted with, because he had to explain away the fact that the deal had not yet been consummated. So he said these were foreign discussions. But the deposition makes clear that they were domestic, and they had not worked out a feasible deal.

Now, at page 160 of the transcript, line 23, Mr. Levy said:

"I agreed that Adam VIII would pay a 12 per cent royalty to John."

Page 40 of Mr. Levy's deposition;

"Q In your view, Mr. Levy, as the negotiating party whose obligation was it to pay the 12 per cent royalty to Mr. Lennon?

"A Big Seven."

That was the point that you began with, your Honor, as to who the deal was with. Mr. Levy on two occasions gives diametrically opposite answers.

I am not going into the statute of frauds, but the issue of novation and the issue of duration, apart from the statute of frauds, are issues of was there a

contract, because both are an essential element.

Now, on the question of novation, I suggest if you are looking at credibility and trying to find out what makes sense, you have a written $500,000 breach of agreement settlement, according to Mr. Levy, and he is telling the Court his version, that over drinks on October 8th he tore it to shreds and said, "Let us just continue on here with a verbal agreement."

You have to accept that premise, if you accept Mr. Levy's story. Now, that may have sounded kind of strange, until you recognize that there may have been a reason for that assertion, and that reason was the general obligations law. Why would a person assert in court that he was giving up a $500,000 settlement? Only because if he had not testified that way, he would be stuck under the statute of frauds. Now, I suggest that makes sense out of it.

Let us talk about duration. This is covered in our brief. You have Mr. Levy's deposition, and I suggest to you if you read that passage and all the subsequent explanation of what he thinks he meant or says he meant, it doesn't make any sense. He said, "We discussed two or three years," and now he says no, it was not going to be two or three years at all.

If you are judging credibility of what makes sense in a deal and you recognize that there is a little problem with saying we had a two or a three-year deal, it makes a lot of sense out of the testimony.

THE COURT: In other words, you are saying that he has tailored his testimony in this trial to work himself out of this statute of frauds general obligation problem?

MR. GRUMBACH: Yes, and he worked himself out of that problem that he had in sitting down with Seider and Graham and coming out with those figures in his deposition at page 360 by saying that they related to the foreign stuff, because he recognized exactly what Mr. Kahl testified.

MR. PRETTYMAN: Your Honor, one sentence, as I understand it:

Capitol buys from Apple at a specific price, and makes its profit between that price and the regular price of the album. Then Capitol pays a pressing fee to EMI for each single and LP sold under the Apple-Capitol license, and EMI pays Lennon what they call a spread, and Mr. Lennon does not have to pay any recording costs out of what he receives.

MR. SCHURTMAN: Your Honor, just to give you a couple of page references -- these are the pages that I

could not find before and I have found them now:

Levy's testimony, pages 1863 to 1864. He specifically testified at that point that they discussed to do only mail order rights until the consent could be obtained, if it could be obtained, on foreign and retail fulfillment.

THE COURT: Which testimony is that?

MR. SCHURTMAN: Levy at 1864.

The question of Adam VIII's function was covered at 1793, Levy, cross. He said:

"We just discussed that Adam VIII would do the selling in the United States for Big Seven."

THE COURT: What is the page?

MR. SCHURTMAN: 1793.

THE COURT: I talked to you for a long time and we will have to have a cut-off. I will take your page references and study them.

MR. SCHURTMAN: I am not going to argue them now. I would like you to look at Mr. Lennon's testimony at page 154 of his deposition, which we have put in. That will give you a different slant than what Mr. Seider said.

One last point in the Come Together settlement and I will sit down; the Come Together settlement had two

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aspects to it:

One was for Mr. Lennon to record some Big Seven songs; the other was for an optional license of masters from the Beatles to Big Seven. That is the part that is critical, because if there is anything analogous between the Come Together settlement and the present deal, it is a licensing of the masters, it is the same type of deal, and you have to look at that to see what the parties thought was essential.

THE COURT: I will consider that.

MR. SCHURTMAN: Thank you very much, your Honor, for your patience.

THE COURT: I think we now have had a really excellent argument and I will expect no more briefs. I will try to get a decision out in the next week or so. It will be as short as I can make it. That is because of the time pressure.

If I can dispose of something on one ground, I am not going into a whole lot of grounds, because I can go on forever. I won't attempt to do that.

I want to thank every lawyer who has participated. It has been very interesting. Everyone has done his utmost to help me. I don't know whether these arrangements about direct and cross ultimately helped or

not, but, at least, you certainly did your best to accommodate me, and for that I am very grateful. I think you have done a remarkable job for your respective clients. You have been fair. I really can't say how much I appreciate it. I guess we will be seeing each other again, no matter what, because this is only Phase 1.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BIG SEVEN MUSIC CORPORATION, et al.,

Plaintiffs,

-against- 75 Civ. 1116

JOHN LENNON, et al.,

Defendants.

Before:

HON. THOMPAS P. GRIESA,

District Judge

New York, February 27, 1976
1:30 p.m.

Walter Conston Schurtman & Gumpel, P.C.,
Attorneys for Plaintiffs,
By: Alan Kanzer, Esq., of Counsel

Marshall, Bratter, Greene, Allison & Tucker, Esqs.,
Attorneys for Defendants John Lennon and
Harold Seider,
By: James M. Bergen, Esq., of Counsel

Cleary, Gottlieb, Steen & Hamilson, Esqs.,
Attorneys for Defendant Apple Records, Inc.,
By: George J. Grumbach, Jr., Esq., of Counsel

Hogan & Hartson, Esqs.,
Attorneys for defendants Capitol Records,
By: E. Barrett Prettyman, Jr., Esq., of Counsel

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THE COURT: Good afternoon, gentlemen. I guess the thing to do is to finish the case today. I understand there are some counterclaims?

MR. BERGEN: Yes, there are, your Honor.

THE COURT: Do you have argument on those or is there any additional evidence? There is no additional evidence on the counterclaims?

MR. BERGEN: Your Honor, there is, but we were not aware that we were going to proceed with that.

THE COURT: What additional evidence would there be?

MR. BERGEN: We have some additional evidence from Mr. Lennon and some other people about the counterclaims?

THE COURT: What?

MR. PRETTYMAN: We have not produced evidence on damages, for one thing.

THE COURT: Isn't that just a matter of argument?

MR. PRETTYMAN: No, it would be a matter of proof.

THE COURT: What is the proof?

MR. PRETTYMAN: By way of example, in terms of our diminished sales by virtue of the Roots album, we

will certainly have to have somebody who would testify what they would have expected these sales to have been if they had not had to rush out the album and the cover and if they had been able to properly sell it and had not had this confusion and competition. I would think that is not just a question of argument. We claim $300,000 as a minimum under each of our counterclaims with punitive damages of an additional $400,000 on four out of five of them.

Now, I don't think we need additional evidence on the punitive damages, but I think in terms of the actual damages, I would think that you would want both the actual sales figures and other figures.

THE COURT: I have the sales figures. Isn't that going to be very speculative, somebody says that the album would have done better but for the Roots album, and then somebody else will simply say, "Well, it didn't do so well because it was not all that popular?"

MR. PRETTYMAN: My understanding of what the law is on this, your Honor, a witness is not allowed to simply guess, but, on the other hand, he is allowed to give an informed judgment, even though it may have a degree of speculation in the sense you can't pin it down to exact amount, just as in an antitrust case, but you do

have testimony with regard to that.

Now, if your Honor has some figures in mind that we can argue about, why, maybe that should be the starting point.

THE COURT: I guess that you were led to believe this was just a conference and I can't expect you to have witnesses here. Well, let's try to get, at least, defined exactly what evidence is needed. I have the rest of the afternoon. You don't think you can get your witnesses down here?

MR. PRETTYMAN: My witnesses are in California. I was just told this was a hearing. We didn't know what the hearing was about.

THE COURT: And I didn't specify it. So, in other words, I can't expect you to put on the evidence today.

MR. PRETTYMAN: I am sorry, your Honor, but I was not forewarned.

THE COURT: Do you want to put your witness on about what the sales should have been?

MR. PRETTYMAN: That is part of it.

THE COURT: And then relating that alleged loss of sales to events connected with Mr. Levy?

MR. PRETTYMAN: Part of this testimony

is in, because Mr. Lennon has testified that he would have done more on the jacket if he had time and made it more attractive and more salable, as he did on other jackets, and that is one of the things your Honor should take into consideration. I think a lot of it is in. I would think there are some holes to be plugged.

THE COURT: That is one?

MR. PRETTYMAN: Yes. I think I can probably do that with one witness. As to the Lanham Act, I think that is pretty well in. The evidence of unfair competition, I think would be in. Misappropriation, in effect, you have already found because you found that Mr. Levy was given the tape for listening purposes and he made the album out of it. It is just a question of damages on that. Interference with advantageous relations, I think you pretty well covered that one; and copyright is pretty much a matter of argument on the law.

So, really, I think the evidence as far as I can tell at this time would almost entirely relate to damages.

MR. BERGEN: Your Honor, we may have additonal testimony, we may not. Mr. Lennon's counterclaims are two. One is under the Civil Rights Law, Sections 50 and 51, and the other one is for misappropriation of his performance without any payment to him. So we may be able to just dispense without any additional testimony.

I would just like to review his testimony since his is really the only testimony in the record so far that even tends to go towards the counterclaims.

THE COURT:Okay. Maybe if we could narrow the legal and factual issues to the extent we could, and before I hear you, Mr. Kanzer, this is the list of counterclaims as I understand them presently:

There is a counterclaim of EMI and Capitol under the Lanham Act, Section 43, false description of origin.

There is a counterclaim of Apple based on a theory of fraud.

There is a counterclaim of Lennon based on unauthorized use of picture and name, in violation of Section 51 of the New York Civil Rights Law.

There is a counterclaim of Lennon for the misappropriation of his music and a request for an injunction and an accounting of profits.

There is a counterclaim of Capitol for unfair

competition.

There is a counterclaim of Capitol for misappropriation of Capitol's rights in the music by virtue of the use of the tapes.

There is a counterclaim of Capitol alleging interference with advantageous business relationships.

There is a counterclaim of Capitol -- the common law copyright, is that EMI?

MR. PRETTYMAN: That's EMI and Capitol. So are the unfair competion, misappropriation and interference with advantageous relationship.

THE COURT: And the unfair competition?

MR. PRETTYMAN: Yes, sir.

THE COURT: Okay.

MR. PRETTYMAN: Did you say EMI and Capitol on the Lanham Act?

THE COURT: Yes, I did. The last one is EMI and Capitol claiming that they had a common law copyright on the tape.

Let us start with some things that I think probably are pretty easy as a matter of law.

I would think it is basically conceded that if Mr. Levy did not have any authorization or permission to use Mr. Lennon's name and picture on the Roots album there

would be a violation of Section 1 of the New York Civil Rights Law. Obviously there is a question of damages, but I don't think there is a legal question, is there, Mr. Kanzer?

MR. KANZER: There may be a question of estoppel on that if Mr. Lennon's actions could have reasonably led Mr. Levy to believe he had consent even if h did not in fact have such consent, your Honor.

THE COURT: Okay. That would be a factual defense. I think that's pretty well embraced in my opinion. But anyway, that would be your only --

MR. KANZER: I believe that would be true, your Honor.

THE COURT: All right. In other words, it is a factual defense of one kind or another and that's it, right?

MR.KANZER: I believe so.

THE COURT: Now let us talk about the Lanham Act claim.

Can you enlighten me, Mr. Kanzer, on your position on the law on that? What I would like to avoid is unnecessary briefing and if we can get the positions on the law either agreed upon or somehow simplified we simplify the amount that everybody has to slave away on briefs,

because nobody wants to present a lot of stuff that is obvious and basically not at issue.

If you could just address yourself to the situation on the law as far as the Lanham Act.

MR. KANZER: Your Honor, I think I share the problem that Mr. Pretty alluded to before. Not realizing that the purpose of this meeting was to have argument either on the law or on the facts, but rather believing that the purpose of this hearing was simply to get a general idea of where we go next, I have not --

THE COURT: You know, I didn't just get you all here to just say hello. If there are witnesses from California and you didn't know you were going to have to put them on, why, certainly, you know, you didn't know it, and I don't expect you to be any farther advanced than you normally would be. But you have been thinking about this case. It didn't just fall on everybody yesterday.

MR. KANZER: That's true, your Honor.

THE COURT: Let's try to do the best we can. At the very least, a pretrial conference is supposed to narrow issues and people are supposed to come prepared to talk about the issues and I expect you to be able to talk about the legal issues. What is your position on the Lanham Act?

MR. KANZER: Our position will be that there

was no false description.

THE COURT: Let me go back to you, Mr. Prettyman. We will switch back and forth.

What is your position, Mr. Prettyman?

THE COURT: Our position, your Honor, is that the Lanham Act prohibits two things, as I understand it, misrepresentation of the source of the goods and practices which lead to confusion among consumers as to the nature or distinct identity of one seller's goods vis-a-vis the other.

THE COURT: Okay. Let's take the language. Have you got the statute, by any chance?

MR. PRETTYMAN: Yes. You want me to read it?

THE COURT: I have it here. What is the language you are focusing on?

MR. PRETTYMAN: I am focusing on "a false designation of origin or any false description or representation", and then dropping down, "by any person who believes" -- I am sorry -- "is liable to civil action by any person who believes he is likely to be damaged by the use of any such false description or representation."

I can give you,your Honor, three citations which will support the fact that a violation occurs when a manufacture attempts to imply that his product has the

authorization or sponsorship of someone who has not authorized or sponsored the merchandise, and that would be Glenn v. Advertising Publications, Inc., 251 Fed. Sup. 261, Southern District New York, 1966, Natcontainer v. Continental Company, 362 Fed Sup. 1094, Southern District New York, 1973, and finally, Geisel v. Poynter Products, Inc., 283 Fed. Sup. 261.

I think what we have here clearly, your Honor, if you look at the cover of the album, you will see that he purported to have authority which he did not have.

THE COURT: From whom, Lennon?

MR. PRETTYMAN: Purpoted to have from Lennon and Apple.

THE COURT: Can I see the cover?

It says "Recordings owned by and with permission of John Lennon and Apple Records."

MR. PRETTYMAN: Right. Of course, that permission was not given.

THE COURT: Again, isn't that a factual -- the Lanham Act provides a cause of action for damages. Is there any question about that?

MR. PRETTYMAN: No, sir. It says "shall be liable to a civil action by any person," and it can be brought by anyone who is damaged by the false

description, not just simply the person who is named.

So I think the evidence is in on this. It is just a question of ascertaining damages.

THE COURT: Okay. We can check those cases. Has your office looked up the law on the Lanham Act, are you able to enlighten me at all, Mr. Kanzer?

MR. KANZER: I know we have researched it to some extent. In fact, I believe one of our prior briefs does touch on the Lanham Act, your Honor, one of the ones that we had submitted originally to Judge MacMahon, but we gave a copy to your Honor, one of the pretrial briefs.

THE COURT: I guess I didn't focus on that. Do you recall what position you took?

MR. KANZER: I believe the position we took was that there was no misdescription, that in fact we had permission, and we were in fact putting out an album of John Lennon which had John Lennon's voice on it and that every statement on the album was correct.

THE COURT: Okay. Now look, let us assume -- again, we don't want to waste time on non-issues -- let us assume for purposes of argument, and we have to assume it because that is the decision on the books right now, let us assume that John Lennon and Apple did not give permission. Is there any reason why the Lanham Act is not

violated, just looking at is strictly as a question of law? Is there any legal problem here, any legal disability to a cause of action under the Lanham Act?

MR. KANZER: I am not familiar with the three cases that Mr. Prettyman has just cited. I would have to read them to understand, your Honor, whether there is a type of misdescription that the Lanham Act is talking about.

It is certainly not a type of description that would mislead the consumer. The consumer is obviously focusing on whether or not this is an album by John Lennon and certainly there is no claim, I don't believe, that John Lennon did not do all the singing that appears on this album.

Now, since I have not seen these cases before, I don't believe they were ever cited to me before, I have the disadvantage of not knowing whether or not they hold what Mr. Prettyman is saying they do.

THE COURT: Okay. We will just have to defer that.

MR. PRETTYMAN: Your Honor, may I give you one more citation, please, sir?

THE COURT: Yes.

MR. PRETTYMAN: Yameta v. Capitol Records, 279 Fed Sup. 582, Southern District New York, 1968.

Injunction in that suit entered by the District Court was vacated on other grounds at 393 Fed. 2d 91, Second Circuit, 1968, but the direct court opinion is instructive because in that case Jimmy Hendrix brought a lawsuit against Capitol Records because he had taken part in a small degree in a session which then resulted in an album and Capitol apparently used his name prominently on the album and he sued under the Lanham Act on the theory that that gave a false impression of his participation in the overall performance and the District Court agreed with him and held that there had been a Lanham Act violation because his role was small.

So that certainly, your Honor, is much less of a violation than would be obvious from the cover of this album.

THE COURT: If you are content, we will read those cases and I don't think we have to have any further briefing from you on that. If the plaintiffs wish to brief that point,why, we will set a time when that can be done.

Let's go down. What about this fraud claim of Apple? What is that?

MR. GRUMBACH: Your Honor, we claim that all of what ensued resulted from the use of the tape that was

handed over at the Club Cavallero in mid November and that that is why, in effect, we were here, the album could never have been put out, none of these things could have happened, that that resulted from what we claim was Mr. Levy's representation, in effect, that he was taking this to listen to it and not for the purpose of putting out an album, and that is, in effect, the claim, and that Mr. Lennon was misled into giving him the album in the belief that Mr. Levy would use it to listen to.

THE COURT: You have all these theories on these counterclaims and they have got to add up to something a little simpler than just a lot of theories.

MR. GRUMBACH: Maybe I can restate it.

THE COURT: You don't need to restate it. What bothers me is that it is just piling on another theory which sounds to me less basic, somehow, than some of the others. What do we gain by having a fraud theory?

You have a theory of Lanham Act violation, you have a theory of Civil Rights Law violation, you have these very basic theories, I don't know whether they are right or not, but the misappropriation of the property, violation of common law.

If there is a cause of action, that is what really went on. There was a taking of somebody's property.

What do we gain by having a fraud claim come into it?

MR. GRUMBACH: I don't know --

THE COURT: I don't know that I could find that -- I mean, you have to prove fraud by clear and convincing evidence and I don't know that I am going to labor long over a fraud theory.

Maybe you don't intend to press it too hard. I don't know. But at that stage I believe that Mr. Lennon and Mr. Seider were indicating strong interest in dealing with Mr. Levy and wanted badly to deal with him and were perfectly delighted to give him those tapes so he could listen and have his interest warmed, if it needed it, and he was delighted with the idea of dealing with them. It just didn't happen to be a contract and never became a contract. But is that the setting where there is any fraud?

He may have later misappropriated what he had gotten under circumstances -- I mean, if you lend me something and I later walk off and take it to South America and make it my own, why, I am violating the purpose for which you gave me the thing. So I don't think -- I am not going to argue about it. I just am not going to spend a lot of time on the fraud theory.

MR. GRUMBACH: May I say two things.

First, I would be perfectly willing to amend our counterclaim to state a Lanham Act claim and the others that we believe are equally applicable.

As to the fraud claim, I think what your Honor has not quite focused on is that Mr. Levy's position was that in his mind when he received this tape from Mr. Lennon he conceived of it as a matter to use for his record.

THE COURT: That is what he now says. You dispute that.

MR.GRUMBACH: That is right, and I say that to the extent that he took that position he did it internally, in his own head, while Mr. Lennon was led to believe that he was given this tape for listening purposes, not to make a record from.

THE COURT: Okay.

MR. GRUMBACH: But I would move to amend the counterclaims similar to those of Capitol and I think that we can get the same relief that way and not insist it be on a fraud theory.

THE COURT: In other words, you are claiming --

MR. GRUMBACH: I think the evidence is in.

THE COURT: You would want to assert a Lanham Act claim because your name --

MR.GRUMBACH: Mr. Lennon's name and Apple's

name were put on the bottom of the record as parties with whose permission Adam VIII was putting out the record. It says P in the circle, I believe Adam VIII, you know, from master tapes.

THE COURT: Right. I have it right here.

MR. GRUMBACH: I think the proof is in and it is just a question of conforming the claim to the proof on that subject, as your Honor has pointed out.

THE COURT: What other amendments do you propose to make or do you move to make?

MR. GRUMBACH: I won't make any others, except that I think that all of the claims that apply to misappropriation are equally applicable to us, not the civil rights claim.

THE COURT: Those are amendments, aren't they?

I am sorry. Let me --

MR. GRUMBACH: Not the civil rights claim.

THE COURT: Okay. Let me be more specific. I think you will have to be more specific rather than just say the others apply. What specific amendments do you want to propose for Apple?

MR. GRUMBACH: In effect, I would asset the same claims of unfair competion and misappropriation, false --

THE COURT: Misappropriation of?

MR. PRETTYMAN: The tape, your Honor.

THE COURT: Let's go through it in an orderly way.

The first counterclaim I mentioned of EMI and Capitol under the Lanham Act, you want to join in that?

MR. GRUMBACH: Yes. That would be the false description.

THE COURT: Right. Mr. Lennon has asserted a claim for injunctive relief and an accounting of profits because of the misappropriation of his property.

Do you want to join in that?

MR. GRUMBACH: Yes, and I think that it will develop that there will only be, in effect, one recovery between the two parties.

THE COURT: Who would be entitled to it, Mr. Lennon or Apple?

MR. GRUMBACH: It is a question of primary and secondary, I believe.

THE COURT: What do you mean?

MR. GRUMBACH: I believe that it flows through Apple to Mr. Lennon, but I would have to verify that.

THE COURT: All right. But it would be a matter of just who is the proper party?

MR. GRUMBACH: I believe so.

THE COURT: Now, then, you would seek to assert an unfair competition?

MR. GRUMBACH: Yes, I think we would be entitled to do that because Apple has a relationship, in effect; the relationship is EMI to Apple then to Capitol.

THE COURT: You wish to assert misappropriation rights?

MR. GRUMBACH: Yes, this should have gone to EMI then to Apple and then to Capitol. It is the same thing.

THE COURT: Then this counterclaim interference with advantageous relationships, does that apply to Apple?

MR. GRUMBACH: I think it would, because we had a relationship with EMI, and then Capitol had a relationship with us.

THE COURT: Capitol and EMI claim that Mr. Levy interfered with their relationships with Lennon and Apple? Is that it?

MR. PRETTYMAN: Yes.

MR. GRUMBACH: It is the other shear of the scissors, if you will.

THE COURT: In other words, you claim that Levy interfered with your relationship with Capitol and EMI?

MR. GRUMBACH: And Lennon.

THE COURT: Then there is the common law copyright?

MR. GRUMBACH: I believe the copyright belongs to EMI.

THE COURT: So you don't seek to assert a common law copyright on behalf of Apple?

MR. GRUMBACH: We are in the middle of the chain between Capitol and EMI. Maybe we are not entitled to that relief, but I will be prepared to submit a brief. At the moment I would rather assert it and then withdraw it.

THE COURT: You are asserting it?

MR. GRUMBACH: Yes.

THE COURT: What do you say, Mr. Kanzer, about Apple's request to amend its counterclaim?

MR. KANZER: We have no objection.

THE COURT: So those amendments are granted.

MR. BERGEN: I would like to amend with respect to the Lanham Act claim, whether Mr. Lennon has any of the other rights.

THE COURT: You would have no objection to that?

MR. KANZER: No. I just want to classify the Apple fraud claim.

MR. GRUMBACH: I am leaving that to the Court.

THE COURT: He is not dropping the fraud claim, but I don't think it is particularly helpful.

So Mr. Lennon is now asserting a counterclaim under the Lanham Act. That amendment is permitted.

Let us get back to the discussion of the legal issues, if we can.

MR. BERGEN: Your Honor, may I just say one thing on the Civil Rights Act claim with regard to what Mr. Kanzer said before about estoppel. I don't have the section in front of me, but my recollection is that the statute is very specific that if you don't have written permission, not only are compensatory damages allowed, but also punitive damages, and I think the wording of the statute is implicit, if you don't have written permission, there is no such thing as estoppel.

THE COURT: In my findings I did not find as to that, but I just think that Mr. Kanzer has a right to stand up and assert his position. But I don't think that it

could be a problem factually, because it just is not part of the factual picture as I have found it. So I don't think we have to worry about that as a matter of law.

Now, let's take the counterclaim of Lennon and Apple for accounting of profits and injunction. The claim of Lennon and Apple is that they own the music -- what is the claim --

MR. BERGEN: The claim is that Mr. Lennon's performances were appropriated, first of all, without his permission, where he seeks an injunction against those performances being disseminated: and then, secondly, that there has not been any accounting to him with respect to any royalties for the use of his name, et cetera.

THE COURT: We have got, as I see it, three counterclaims hereon three different theories that assert misappropriation of property, as distinct from other things. They assert that Lennon's performances were misused, appropriated --

MR. BERGEN: That is correct.

THE COURT: Then we have one counterclaim of Capitol and EMI to a violation of a common law copyright. Then we have another somewhat more general property theory asserted by Capitol and EMI and Apple that there was a misappropriation of rights in the music.

Isn't that right? You got a common law copyright claim and then you have got just a generalized property claim?

MR. PRETTYMAN: The specific property claim, that is, the tape was owned by EMI and Capitol had rights in it by way of its collateral relationship and that tape was misappropriated.

THE COURT: That is specific?

MR. PRETTYMAN: Quite specific.

THE COURT: So it is not just a right to the music; it is a right to the tape?

MR. PRETTYMAN: And so far as the misappropriation counterclaim is concerned, that is correct.

THE COURT: Let's talk about the common law copyrights. Can you explain that theory a little more?

MR. PRETTYMAN: EMI had the common law copyright, the right to put out the album in the first instance. It owned exclusively the common law copyright in the tape.

THE COURT: Under what? Under contract or what?

MR. PRETTYMAN: That is common law, your Honor, because a copyright was actually filed for later, but the point is that EMI had the exclusive right of first

publication, whereas that was violated by the plaintiffs, who put out this album first. Then the statutory copyright was applied for thereafter.

Now, we are claiming damages for the common law copyright, because we had the right of first publication, and that was violated by the plaintiffs, who didn't own the common law copyright.

THE COURT: I suppose all these agreements are in evidence. But what is it that gives you the exclusivity? A contract?

MR. PRETTYMAN: Sure. It arose out of the contractual obligations, that is, Lennon give the rights to his performances exclusively to EMI and then EMI passing them on.

THE COURT: Which contract?

MR. PRETTYMAN: The 1967 contract would give EMI the rights and the 1969 contract would give Capitol the rights, and by virtue of the performer giving all rights to his performances to a particular party, that party then has the common law right on the performances subsequently put out, because it has the exclusive right of first publication.

THE COURT: And this relates to that tape?

MR. PRETTYMAN: Yes, sir, relates to the record,

the album, not just the tape.

THE COURT: Any record made from the music?

MR. PRETTYMAN: Absolutely.

THE COURT: The thing that confuses me for amoment is this: In the decision I just handed down I didn't find it necessary to make any definitive findings or holdings as to the exact statutes of the mail order rights and so forth; it didn't seem to me that it was necessary, simply because there was a question that was enough in my view to make it impossible to reach a meeting of the minds and so forth.

But if we get to the question of exclusive rights under the contract, I suppose that -- well, let me put it this way -- do I have to make a definitive finding about those contractual terms, for instance? Is it necessary to rule on this claim -- I guess I am answering my own question. If you put together Capitol, EMI and Apple, between the three of them they got all the rights?

MR. PRETTYMAN: That is the point. I don't see you have to reach the question that you have to decide for two reasons, first of all, it is clear from the opinion that Levy didn't get anything; he didn't get any rights, so he didn't have the right of first publication or any publication; and, secondly, the rights certainly

reside somewhere between EMI and Apple and Capitol, and they all agree to that.

THE COURT: If you are talking about common law copyright, Apple has just announced to me they don't contend they have any copyright.

MR. GRUMBACH: I didn't say that.

THE COURT: You said you didn't --

MR. GRUMBACH: I said it didn't have any civil rights under Section 51.

THE COURT: You said you were not seeking to join in the copyright claim?

MR.GRUMBACH: I said that we might be in th chain between them.

THE COURT: Yes, you said you wanted to brief it. I beg your pardon. I had forgotten that. I am sorry.

MR. PRETTYMAN: I think what you will find, your Honor, insofar as the common law copyright is concerned, it resides exclusively with EMI in the first instance.

THE COURT: Is anybody able to point out the provision in the 1967 agreement that you rely on? Have you got that? What exhibit is that?

MR. PRETTYMAN: It may take me a few minutes. Offhand, and this is a quick survey, but in Defendants' Exhibit B, which is the'67 agreement, we

would cite to you paragraphs 2, 4 and 11.

THE COURT: Let me read those.

I don't think this would be the right contract?

MR. PRETTYMAN: This is the '67 contract, your Honor.

THE COURT: I am sorry.

(Pause.)

MR. PRETTYMAN: Your Honor, can I show you something else? This is Plaintiffs' Exhibit P-7, which is the Rock and Roll album, and I call your attention to the legend at the bottom, the P circled, which means performance copyright, "1975, EMI Records Limited, Manufactured by Apple Records, Inc.", with the address.

So both the statutory copyright is taken out of EMI's name and EMI by virtue of the '67 agreement has all rights to the performance and therefore has the common law copyright for first publication.

THE COURT: Maybe I am missing something, but I don't see that the '67 agreement, Exhibit B, does that.

Isn't it true that the '67 agreement, Exhibit B, is an agreement whereby EMI seeks to deal with the distribution of the Beatles' records in North America?

MR. PRETTYMAN: Wait a minute.

MR. BERGEN: It is the entire world, your Honor.

MR. PRETTYMAN: Have you got the right exhibit, your Honor? Is that the '67? I think you are looking at the wrong one.

THE COURT: I am sorry.

MR. PRETTYMAN: Here it is. It is 2, 4 and 11.

THE COURT: All right.

(Pause.)

MR. PRETTYMAN: In a nutshell, EMI got exclusive rights to Lennon performances. Part of that package is the right to copyright as reflected in the album itself?

THE COURT: If I recall correctly, I asked Mr. Schurtman at one point in the trial. He said something to the effect -- can't remember too clearly, but I think basically Mr. Schurtman conceded what I guess is obvious to everybody, that if Capitol and EMI had the exclusive rights and they hadn't released those rights, then Mr. Lennon and Mr. Seider sitting at that table would be incapable of making a contract, they would not have the power to make a contract.

It seems to me it flows from that, whether you call it common law copyright or what, if Capitol and EMI had exclusive rights to distribute recordings and they didn't contract away those rights, then nobody can issue recordings. I wouldn't think there would be much of a legal issue, would there? I go back to the point that you don't concede the facts, but as far as the law, I don't think there is any problem.

MR. KANZER: We would concede that we would not, on the facts that your Honor has found, have the common law copyright. I don't purport to know who would understand

these circumstances. That's really for the defendants to argue about. Idon't know whether it would truly be in EMI, in Capitol, in Apple, or for that matter, in John Lennon, in this situation.

THE COURT: Let us just forget the magic word copyright. Let us assume that Lennon and Apple have -- let us assume that between them EMI, Capitol and Apple have the totality of the exclusive rights to issue John Lennon's records.

Now, somebody purports to issue a John Lennon record. As a matter of law, doesn't one or more of the three owners have causes of action against that person?

MR. KANZER: I don't deny that, your Honor.

THE COURT: All right. Then I don't think we have probably too much of a legal problem to sweat about.

MR. PRETTYMAN: I would just want to point out one other small fact for the record.

The Roots album, as I recall, has the P on it circled and it is my impression -- Mr. Kanzer can confirm or refute this -- it is my impression that the plaintiffs never did actually apply for the statutory copyright. Is that correct?

MR. KANZER: That is correct.

THE COURT: What does the P mean?

MR. PRETTYMAN: Pardon me?

THE COURT: What does the P mean?

MR. PRETTYMAN: It is the same thing as the C. It means the copyright in the performance.

THE COURT: I see.

MR. GRUMBACH: It is a federal copyright.

MR. PRETTYMAN: Federal copyright, yes, sir.

THE COURT: Let us assume that under one theory or another there was a misappropriation of the rights and tapes and so forth. We are dealing now with those three counterclaims that we talked about ir the last few minutes.

We have, I gather, three forms of relief requested, or four forms maybe. There is an injunction sought. Do the defendants still seek an injunction or don't they?

MR. GRUMBACH: Your Honor, they answered our interrogatories by indicating that they continued to sell the album from time to time.

THE COURT: Okay. So you are still seeking an injunction, right?

MR. GRUMBACH: Mr. Lennon.

MR. BERGEN:Yes, we are, and I think part of that injunction is somehow getting either in our possession

or having destroyed the albums that have not been sold and are sitting in a warehouse some place, so that they are not sold.

THE COURT: Are all the defendants seeking an injunction?

MR. PRETTYMAN: I am not to date. Frankly, I haven't because I just didn't want to join in that process. But we are as interested in an injunction as anybody else.

THE COURT: All right. The way I think it ought to be, I don't think we ought to have the unnecessary complication of having one party ask for this little bit of relief.

MR. PRETTYMAN: Yes.

THE COURT: I think frankly we ought to get this down to some kind of basic, reasonably simple framework, and I think now what we have is that on one theory or another Lennon, Capitol, Apple and EMI, there is a violation of their rights by taking these tapes and making records and purporting to issue them, right?

MR. PRETTYMAN: Yes, and I would say further that we independently rely, of course, upon this interference with contractual rights.

THE COURT: I am coming to that in just a moment.

MR. PRETTYMAN: I am sorry. All right.

THE COURT: Let's call what I just talked about the property claims.

MR. PRETTYMAN: Very good.

THE COURT: That embraces the appropriation of the tapes, the appropriation of the performance, the common law copyright. I just put those for convenience purposes for the present under the rubric of the property claims.

Now I will consider that all four defendants are seeking appropriate injunctive relief. I will also consider that all four defendants are seeking whatever monetary relief is appropriate to their situation.

Now, on that, let's talk about that for a moment. Let us start with Mr. Lennon. What monetary relief is he seeking on one or more of these property claims? I am not talking now about the civil rights or the Lanham Act.

MR. BERGEN: The monetary relief that we are seeking is some kind of an accounting as to what royalties Mr. Lennon would be entitled to by virtue of the use of his performances without his permission. If his performances are going to be used and the plaintiffs made some money out of the use of his performances, then it is our

position that Mr. Lennon is entitled to that money, because --

THE COURT: Wait a minute. You have mentioned royalties and then you have indicated profits.

MR. BERGEN: I believe the counterclaim states the profits, your Honor.

THE COURT: Okay.

MR. BERGEN: I think he is entitled --

THE COURT: On the property claims are you seeking any damages?

MR. BERGEN: Yes, your Honor. The misappropriation of his performances without his permission and an accounting as to what profits --

THE COURT: On the property claims you are ·king the profits?

MR. BERGEN: That is correct, your Honor.

THE COURT: Period.

MR. BERGEN: I think that is all we are entitled to.

THE COURT: I think that is all you have asked for. Okay.

Now let's go to Capitol and EMI.

MR. PRETTYMAN: Capitol and EMI each seek a minimum of $300,000 on each of the misappropriation and

copyright counts and $400,000 each on the misappropriation and copyright claims, which means a total --

THE COURT: You mean punitive damages?

MR. PRETTYMAN: Punitive, yes.

THE COURT: The $400,000 is punitive?

MR. PRETTYMAN: Yes, sir. So that would be a total of $600,000 against compensatory and $800,000 punitive on those two counts.

THE COURT: How you file the two claims one on top of the other?

MR. PRETTYMAN: In all candor, I must tell you, your Honor, that I would concede that there is perhaps some overlapping.

THE COURT: Okay.

MR. PRETTYMAN: I would hope that I could draw a sufficient distinction between them so that they would not be totally overlapping.

THE COURT:Okay. You are claiming damages, not accounting --

MR. PRETTYMAN: Yes, sir, plus the injunctive relief that you just talked about, but not an accounting.

THE COURT: How about Apple?

MR. GRUMBACH: I don't think that we would claim an accounting. I think that we are again in the middle

between EMI and Capitol and our claim would be the amounts that we suffered because of that intermediary relationship.

THE COURT: How did that damage you? How did this damage Apple?

MR. GRUMBACH: It damaged Apple in the sense that Apple had the rights in North America which were sub-licensed to Capitol and Capitol had to remit, I suppose, to Apple, which in turn would pay Lennon.

THE COURT: Let us suppose that Mr. Prettyman succeeded in proving a certain particular amount of damages under the claim that Capitol could have sold a lot more records had it not been for the misappropriation. You wouldn't want anything in addition to that, you would just simply say that that would flow through to Apple, isn't that right?

MR. GRUMBACH: Yes, your Honor, on that, but as long as you were clear in delineating, you know, the basis of your award so that it would flow through. That would be satisfactory.

THE COURT: Your theory really is that you want the proper accounting, so to speak, of any damages awarded on account of loss of record sales.

MR. GRUMBACH: That is correct.

THE COURT: Okay. That is clear enough.

MR. PRETTYMAN: Your Honor, I left out one element. I am sorry. I would also seek counsel fees under the Lanham Act and also under copyright.

THE COURT: Common law copyright, you get counsel fees?

MR. PRETTYMAN: I haven't researched that, your Honor. I am throwing it in.

THE COURT You get counsel fees under the Lanham Act?

MR. PRETTYMAN: I believe we do, yes, sir. I will do a double check on it.

THE COURT: Okay.

MR. GRUMBACH: Your Honor, I assume you recognize that we will claim them too.

THE COURT: Sure. I would assume anybody who is entitled to counsel fees gets it. Just let me know.

We have two other things we haven't talked much about and that is unfair competition and interference with advantageous relations. Those appear somewhat murky to me.

What is the unfair competition claim? How does that add anything to what we have talked about in the last few minutes?

MR. PRETTYMAN: It doesn't relate specifically

to the misappropriation of the tape or anything of that sort. It is that the plaintiffs, knowing that they lacked any authority to do so, intentionally put this album out in competition with Capitol, which did have the rights, and they did so in disregard of the rights of Capitol and EMI and in derrogation of Capitol's and EMI's contractual rights. That is essentially what unfair competition is.

THE COURT: In the first place, I have two reactions.

You stopped it pretty quick. They only sold about 1200 of those things.

Second, even so, how does it add anything to what you have already told me? It wouldn't give you special additional damages, would it?

MR. PRETTYMAN: Your Honor, I guess the best way to say this I quite agree with you that each one of these claims to a certain extent overlaps the other, but we have taken the position that we want to cover the entire course of conduct here and include everything that was done, and in order to do that you really have several different things that are attacked, under the Lanham Act, for example, the description on the album, under the common law copyright something else, under the misappropriation the use of the tape, under unfair competition and the

interference with contractual relationships you look at what they actually didon the market and what they did to our contractual relations, and I think that what we have done in our five counterclaims is in effect to bracket the entire course of conduct here.

I think your Honor is quite correct that unfair competition is largely covered by the others, but I think that it is there to complete the circle and make sure that everything that was done here that was done improperly is covered in one or the other of these five counterclaims.

THE COURT: You see, I have no objection at all to putting forth the different theories, but when you are talking about damage in a factual sense, I have got to wrestle with the problem, and I appreciate trying to think it out as much as we can now.

Let us approach it this way. Let us put aside the different legal theories and let's try to think what are the limits of damages in fact that the defendants are seeking, not for something, but what was the damage.

MR. PRETTYMAN: Right, okay.

THE COURT: Let's just list all the elements of damage you are going to try to prove.

MR. PRETTYMAN: I think I see what you are

getting at.

First of all, you have Capitol having to rush out with an album prematurely, before it was properly prepared, and consequently not selling as many albums as it should have because of that.

Secondly, you have Capitol, because of the confusion in the public mind over these albums, not being able to sell as many as it should.

Thirdly, you have the cover, for example, and this will come I think under unfair competition, the cover of the Roots album denigrating Lennon as an artist and, in effect, putting him down and making him not an artist of major stature, but a secondary artist, by virtue of the presentation made in the Roots album, which, of course, directly affects the albums that Lennon and Capitol are attempting to sell.

THE COURT: Wait a minute. You mentioned one or two things that related directly, as you have put it, to the sales of the Rock and Roll album put out by Capitol, right?

MR. PRETTYMAN: Yes, sir.

THE COURT: The allegation that this was rushed to production, that there was confusion in the public mind, all would go to, under your theory, a reduction in the

sales of the Rock and Roll album, right?

MR. PRETTYMAN: Yes, sir.

THE COURT: Then you got into something that sounded a little different, the unfavorable impact on Lennon in general. Do you say that has a relation to the sale of both the Rock and Roll album and other Lennon albums?

MR. PRETTYMAN: Oh, absolutely. I think that when somebody intentionally puts out something which turns a major artist in the public mind into a secondary artist or makes him look less important currently than he is -- you heard some testimony on the stand, it might have been by Alan Klein, it might have been by someone else, to the fact that they were opposed to John Lennon putting out a TV package because TV packages are often thought of as old songs and sometimes by people who are no longer really on the top of the heap, so to speak, and it is a long the same analgous nature that I would put forth this theory that when you put out an album that looks like that album in front of you, that Roots album, that takes away from the stature and the selling power and the importance of a major artist, and that directly affects sales, because the public takes a different attitude toward an ablum which comes out which everybody thinks is important, it is an important star and they want to get hold

of it, they think differently about an album of a has been or somebody who perhaps is a little less important than he used to be. So I think very definitely that that is an element of damages.

THE COURT: Has he put out any album since the Rock and Roll?

MR. PRETTYMAN: No, sir.

MR. BERGEN: No, he has not, your Honor.

I am sorry. There is an album that it out which is called Shaved Fish, but that is an album which consists of prior Lennon recordings. There was no new recording on that album. There were some songs from Walls and Bridges and Imagine and then some single records that were not in any albums that Mr. Lennon did and they were kind of compiled in one album. But there were no new recordings. That album was released I believe just before Christmas.

MR. PRETTYMAN: Then there is another item here and that is the content of the album itself, that is, this tape was a premature tape, as your Honor ruled, that had not been finally edited. So we have on the market an album which is not the album that John Lennon intended, it is not up to the level that he wants it to be, and I would emphasize to your Honor that although it may be difficult for persons like yourself and myself, who are not

as attuned to this as some others, so far as the artist himself is concerned, this is of major importance, as to precisely how he is heard in the finished album and how that is preserved for time, and I think that putting an album that was an incompleted album on the market is very much of an element of damages.

THE COURT: On that, if you want to do anything with that you will have to have evidence that gets into the record in some satisfactory form, because I did listen to the two albums and I will say that to my ear there was some distinction, and I am saying this in a kind of an unsure state, that it did seemto me that the quality of the Levy album was not as good as the quality of the Capitol album. But that is something that I would think you would have testimony on.

What I am really trying to say is I don't feel confident enough -- in the first place, I didn't listen to it very long and these distinctions are somewhat subtle, and I think subtle distinctions are important in music, and there are people who listen to this kind of music all the time to whom they are not so subtle probably. So I am prepared for all of that.

What I am really suggesting is that that type of claim, I would think if you want to make it you would

have to get somebody on the stand and have those things played and really put in the record what the distinctions are, this is more fuzzy than that or -- I don't know.

MR. PRETTYMAN: Your Honor, I would say two things to that. I am of course happy to present that kind of testimony if your Honor feels the necessity.

I will point out to you that I thought Mr. Lennon really went into that in some detail, the difference between them, for example, pointing out the two songs that he did not want published were in fact published, and he pointed out the editing that he had done at the end that was not on the other one.

THE COURT: I am aware of that. The only thing is in the last analysis how much difference does it make in the product?

Of course, the two songs are out, but what difference can it be said to make in the actual quality of the songs presented. I know you got the machine here and it didn't work very well. I certainly did not need it in my opinion, but I am just saying to you if you want any substantial consideration of that phase I think you ought to have some evidence.

MR. PRETTYMAN: I will be happy to follow through on that. I would like to point out and make sure Your Honor understands our position. If you had Caruso, if you had the world's greatest living opera singer and he or she made a record and there was another album out that was a little bit different, a little bit different version, but only to the most trained ear, we would take the position that it would make no difference if you played the two of them on the ordinary home machine, that the ordinary listener would not detect any difference.

THE COURT: What did you just say? You take the position what?

MR. PRETTYMAN: If you took those two records and played them on an ordinary home machine, the fact that

the ordinary listener could not really distinguish between the two is irrelevant when it comes to the real damage that has been done, because the sole difference is perhaps only that the major star could hear, detect.

THE COURT: The entire difference from whom?

MR. PRETTYMAN: Your Honor, may I use an analogy? I happen to represent a great writer and she has been implored by the New Yorker for ten years to send a story to them and she finally did and they sent it back ecstatic and said, "It is absolutely fantastic; we do want to change one little sentence on page 7, just a few words." And she immediately demanded the story back and it was never published in the New Yorker. The fact is we could have read those two stories with those few changes and it would not make any difference at all, but to her, just the changing of the nuances, a few words changed, changed the style of the sentence, changed the sense of the sentence, the sense of the paragraph, the sense of the story. Although it is just a few words, the ordinary reader may not detect the difference, the difference is irrelevant, but when you are dealing with a great artist, there is a difference.

THE COURT: You can read it the way you wish. I am just saying if you want to get damages on the basis

that there was some impairment inflicted upon Mr. Lennon in some way because of the release of this album that was not finally edited, you leave it the way you think it ought to be left, but if for any reason you want to prove that there is a difference in the quality of the music, no matter how subtle, no matter how obvious or whatever, I am just suggesting I am not in position to make much of a finding because I heard this quickly with an ear that probably is not as trained as it should be, and that is all there is to it. That is all I am saying to you. You decide what you want to do.

MR. BERGEN: That is basically the testimony that I was talking about that we would want to put on.

THE COURT: Okay. I will just expound -- I don't go into this form of music, but I do a lot of listening, I am very interested in music, and my feeling is I have had some occasion to go into this subtle difference, freezing, touch, et cetera, but they are not going to be recognized by the listener in those terms; the listener is not going to sit there and say, unless he is an expert, "Well, this phrase should have consisted of three notes, instead of four notes."

But all of those differences make up to an impact on a listener. It is the difference between

a lively performance and a dull performance, that kind of thing. So I am prepared to realize the importance of the most small differences, but I just have to have it made plain.

MR. PRETTYMAN: You don't need any additional evidence, I take it, with regard to the cover?

THE COURT: The cover I can look at.

MR. PRETTYMAN: Yes, sir.

THE COURT:Now, you were listing the elements.

MR. PRETTYMAN: Let's see. I think I mentioned the different things, the value of the artist, lost sales, lost future sales, sales on other albums, difficulties caused in the contractual relationships between the parties.

THE COURT: What are those difficulties?

MR. PRETTYMAN: It is a little awkward to get into this, but I think there are the strained circumstances by virtue of the fact that we were brought into this suit, have had to spend thousands of dollars helping to defend it, questions raised as to what actually happened here and who is going to send telegrams -- it has caused a tremendous amount of difficulty between people who had the very best of relationships. And I don't mean to say that we think less of Mr. Lennon, but I say a tremendous

amount of mischief has been done by the bringing of this lawsuit and that that should be accountable in some way, and the interference with the contractual rights, really, is what it is all about.

THE COURT: The bringing of this lawsuit or the other events that preceded it?

MR. PRETTYMAN: The acts that gave rise to the lawsuit is what I more mean, although I must say that I do regard the bringing of this lawsuit as part of the mischief that was done.

THE COURT: Can you get damages because of the bringing of the lawsuit?

MR. PRETTYMAN: It depends on the reasons for bringing the lawsuit, whether it was brought to be vexatious or to be punitive or to protect yourself when you know that you are in hot water; I think the reasons that you bring it can be an element here. But, certainly, all of the acts that gave rise to the lawsuit go under interference with contractual rights.

THE COURT: Let us pause there. The problems created about selling the Rock and Roll and other records, that may be complicated, but, at least, that is one type of problem. We will get into that.

Now, when you get into interference with

relationships, that is another type of problem needing other types of rpoof, and I really dread to think of the many, many days being spent with people telling you how they are getting along or how they have not gotten along. Is that what we are in for? I tell you right now, there is nothing in the record, not a bit that would justify me to give a dollar for interference with relationships. There has been evidence that could be brought forward, in other words, Mr. Menon gets on the stand and says that "Due to these events a strain has developed; we are having trouble dealing with Mr. Lenon; he won't talk to us."

Or Mr. Lenon gets on the stand and says, "I don't sense the same trust from Capitol."

But that is the kind of thing you would have to have. I don't have anything on that now. That is really a veritable can of worms. If you want to get into all that --

MR. PRETTYMAN:I am somewhat taken aback by your Honor's statement that this record won't support a conclusion along that line.

THE COURT: I just throw that out becuase I know I am just sort of thinking out loud, but, you see, you tell me something in the record that would justify such

a finding.

MR. PRETTYMAN: You certainly recall the evidence that went in, that Capitol had to call Mr. Lennon and Mr. Seider in and get them to give all assurances that they had not, in fact, given the rights to anyone, and that had to be repeated on a number of occasions. You heard some testimony about the dispute as to what positions were taken and things of that sort. I think there would be something there. But if that need to be augmented, I would be happy to do that.

THE COURT: I would consider dropping that There was some comment on the record to some extent and I was questioning Mr. Seider, and he may very well have been a problem a relationship problem created. It was all in terms of the most gentle situation. But, frankly, I wondered whether it was all that diplomatic, and there may have been a real problem and some sore feelings there among different people.

But you got to consider that, that Seider and Lennon nevef told Capitol one word about this for an awful long time. So if there was a strain developed, one wonders whose fault it was, limiting myself solely to the question of a strain in relationships.

MR. PRETTYMAN: I am just talking about

Capitol and EMI.

THE COURT: Well, then, sue Lennon. No, I am serious. I think Lennon and Seider -- I think as long as I put the decision on the boks I will expand on it -- it seems to me that they wanted to do this deal with Levy, and for reasons which I don't fully understand, maybe it was their exact degree of interest or a strategy on their part, they never said a word to Capitol and EMI about the specific thing for a period of three months, during which time all this was percolating and so forth. Now, I would say that the strain in relationships would not have developed if they had marched right out to Capitol and EMI and said, "Listen, this is what we are interested in. What do you think?" The thing could have probably been resolved by October 10th. So I would sort of give a thought to that.

MR. PRETTYMAN: I will certainly take that into consideration.

THE COURT: Now, are there any other elements?

MR. PRETTYMAN: I have been handed a note which says counsel fees can be awarded any time punitive damages are awarded as a basis for punitive damages, and your Honor know that I am seeking counsel fees wherever I can get them, and whether they come under the

Lanham Act, the copyright or the punitive damages, I will seek them where appropriate. As I guess you know, this has been a tremendously expensive endeavor for my clients. That is one thing. They are very adamant about doing something about those fees.

THE COURT: I have got to get an estimate of how long this would take and set a date for this proof.

MR. PRETTYMAN: I don't think my evidence is going to take very long at all.

The way I presently view it, I am thinking of putting Mr. Menon and possibly two other witnesses on the stand. I think that would probably do it. I don't really view that as a drawn out process.

THE COURT: Like what?

MR. PRETTYMAN: A day, a day and a half. I am taking cross examination into that. I think the whole thing can be gotten over in a day and a half.

THE COURT: Mr. Kanzer, can you be of any help?

MR. KANZER: One of the plaintiffs, Big Seven, wishes to amend at this time to include the cause of action for breach of the October 1973 settlement pursuant to 15-A and 15-B of the Federal Rules.

Your Honor, in effect, found already that that agreement was not abrogated; itis stated in your Honor's

opinion. We did plead the making of it. We plead the breach of it and the only thing left is the damages. I doubt that it would take us more than half a day of testimony to go into that. I don't think that there is any prejudice that would be undue prejudice that would result to the defendants to go into that issue, because that issue was pleaded, other than the actual request for relief.

THE COURT: Whom would that claim be made again?

MR. KANZER: Lennon only. Lennon is the only one who had any obligations under the settlement.

THE COURT: Apple didn't?

MR. KANZER: Apple didn't have any obligations under the agreement. If we were barred from this we would presumably bring an action to revive the underlying infringement action, which would, of course, involve Apple as well. But at the moment we are only seeking to enforce the October '73 agreement, and the only one with an obligation under that is John Lennon.

MR. GRUMBACH: May I just correct the record. In the settlement in open court before your Honor, the magic words "with prejudice" accompanied the dismissal against Apple, and there was a little lingering thought in Mr. earlier brief which I would like to correct. We take

the view there is no way that the first settlement somehow has life against Apple.

MR. KANZER: I don't know whether there is any point in arguing that at this stage. It is an executory order, and we have always the right under an executory order.

THE COURT: Tell me where in your view the October'73 settlement stands? Can I have that Exhibit 11? And Exhibit 12, if you will. Could I have that letter of December 31, 1974?

MR. GRUMBACH: It is attached to the complaint.

THE COURT: What do you claim? What is your cause of action that you want to assert?

MR. KANZER: The cause of action that we want to assert is that in October, 1973, as part of the settlement of the infringement in federal court between Big Seven Music Corp. and Apple Records, among others, Apple Records and John Lennon stipulated in open court through their attorney, Michael Brown, that certain things would be done by John Lennon. Mr. John Lennon would do two groups of things: First, he would on his next album record three songs, the copyrights of which were owned by Big Seven Music Corporation; second, he would use his best efforts to cause or attempt to cause Apple Records to license three masters from its non-Beatle catalog to

Big Seven, and in the event he failed to do that or was unable to get Apple to do that, then he would record two additional songs, the copyrights of which were owned by Big Seven, one by December 31, 1974, and the other by December 31, 1975.

The next album as defined by that stipulation was Walls and Bridges. Walls and Bridges came out with exactly one song owned by Big Seven, namely, Ya Ya. There has been testimony to the effect that even that one song was not in compliance. The October '73 settlements specifically provides that the song You Can't Catch Me had to be one of the three songs that would be so recorded. It was not recorded on the Walls and Bridges album, and to date he still has not complied, because the only songs which he has recorded and which have been released on an album that contain copyrighted songs by Big Seven are Ya Ya, which has been recorded perhaps twice, and You Can't Catch Me, and except for Angel Baby, for which there was not the right to release, he has not recorded a third song.

Moreover, we still were never licensed by him by December 31, 1974, to have the rights to the masters of any, let alone the requisite number of their catalog of non-Beatle songs, and John Lennon, of course, did

not do the other alternative, namely, recording two additional songs, copyright of which is owned by Big Seven.

THE COURT: Let us take a short break. We will come back to that in just a minute.

(Recess.)

(Continued on next page.)

THE COURT: All right. What is your position on the amendment, Mr. Bergen?

MR. BERGEN: Your Honor, our position first of all is, with respect to the October '73 settlement, we made a tender of these three non-Beatle songs to be licensed by the December 31st Dolgenos letter and that was rejected by the January 9th letter, in which Mr. Levy took the position that he had a new deal.

Furthermore, they accepted royalties on the version of Ya Ya that appeared on the Walls and Bridges album, they have accepted royalties on the two songs, You Can't Catch Me and Ya Ya, that appeared on the Rock and Roll album.

As far as the amendment itself, we would like to dispose of this thing altogether and right here and now ourselves, but our position on that is that Mr. Levy and his company, and I guess it is Big Seven who is asserting the amendment, are judicially estopped from at this point saying that they still have a claim under the October '73 settlement, because in order to avoid a motion for summary judgment under the statute of frauds, under the executory accord doctrine and provision of the New York statute of frauds, it was necessary for Mr. Levy and the plaintiffs to take the position that the October '73 settlement

had been wiped out off the books and to avert that there was in fact a novation.

So they took that position and therefore forced us to a trial where we believe that had they not taken that position and said that the October '73 settlement was still out there and they still had a right to sue on it we could have moved for summary judgment, avoided this trial.

We have gone through the whole trial and they consistently, right up to the last minute -- I mean, Mr. Levy swore under oath that the October 1973 settlement had been just torn up and thrown in the wastepaper basket --

THE COURT: What is the executory --

MR. BERGEN: The executory accord is that when they entered into the October 1973 settlement, if it is an executory accord they would have said, and that is why I believe I asked Mr. Levy some questions on this, the executory accord would have been "Okay, we have a new deal, but if you, John Lennon, dont' live up to this deal we are still going to be able to go back and sue on the October '73 settlement," and Mr. Levy --

THE COURT: Would that have been barred by the statute of frauds?

MR. BERGEN: Yes, it would have. There is a memo on this.

MR. GRUMBACH: We submitted a memo dated January 30th on the statute of frauds issue and if you look at that memo it sets forth the section and basically what it says is that if you have only an executory accord rather than a novation and it is not in writing, regardless of the duration, it is unenforcible, which is why I said on my summation to you that I suggested that that was why that point was made, because this suit on the new deal could never have been brought absent an assertion that the '73 settlement had been abrogated. That was the whole rationale of it.

MR. BERGEN: At this late date, your Honor, to come in and suddenly say "Despite the fact that I swore under oath and our position throughout the lawsuit was that the October '73 settlement was no longer in effect and had been torn up and thrown away, I am now going to sue you on that," I believe that is where Big Seven is judicially estopped from asserting that claim at this point.

THE COURT: What is judicial estoppel? I don't know what that is.

MR. BERGEN: The fact that they have taken this one position and gone through the entire case, where we could have moved under the statute of frauds had they

taken the position that they are now taking and moved for summary judgment, they have required us to go through an entire trial after taking this one position that the October '73 settlement was abrogated.

Now they have done a complete about face, after putting us through the whole trial, and say they are going to assert that claim.

I believe we can present case law on this point, your Honor.

MR. KANZER: Could I be heard --

THE COURT: I wonder this, Mr. Bergen: That goes to the merits?

MR. BERGEN: Yes, it does.

THE COURT: But my feeling is that, in the first place, the October 1973 settlement is a federal court settlement, and indeed it was entered before me, and there is law I think that settlements under some circumstances can be summarily enforced by the Judge before whom those settlements are entered, so it strikes me that this is an appropriate court to litigate the business about whether there is anything still to be done on the settlement or not.

Furthermore, it is intertwined with this litigation. That doesn't mean that there is or is not merit to the contention the settlement was breached. I don't

know. But I think I will permit the amendment of the complaint to assert as an alternative claim the breach of the October 1973 settlement.

MR. BERGEN: Your Honor, may I just say that I don't disagree with your Honor.

THE COURT: Okay. Hopefully it helps to wind these controversies up.

Now let us try to fix dates for briefs or whatever we have to do.

MR. BERGEN: Your Honor, that is just against Lennon?

THE COURT: That is all that is sought?

MR. KANZER: Yes.

THE COURT:Okay.

MR.PRETTYMAN: Your Honor, I am a little bit concerned from my clients' standpoint. We have no interest whatever in that particular part of the suit. Can we do one or the other first and then have a cutoff, so to speak, instead of having the whole thing commingled, because it is going to cost my clients a great deal of money for me to be present while that action is being pressed and it just simply doesn't involve us?

MR. KANZER: Excuse me, your Honor. It might be useful if I point out that I doubt that given all the

testimony that has gone in on this matter already that we are talking about more than a half a day on that issue.

THE COURT: I hope we are not talking about much time on any of this, frankly.

Let's do this: Let us consider that we are going to handle everything first and the October 1973 settlement second. Maybe that comes in the second hour of a two-hour session. I hope it does.

MR. PRETTYMAN: That is fine, your Honor.

THE COURT: But I don't know.

MR. PRETTYMAN: That is fine.

MR. BERGEN: Your Honor, would we be permitted before the hearing to submit a brief to you on the question that I was just raising about the judicial estoppel, a short brief?

THE COURT: I guess so. You are sort of thinking of two days being necessary?

MR. BERGEN: I think it would probably take about wo days, your Honor.

MR. KANZER: Your Honor, plaintiffs do have a scheduling problem I would like to bring to your Honor's attention.

THE COURT: What is that?

MR. KANZER: You may recall before this action

was begun that Mr. Schurtman advised the Court that he would be in Europe for a period of time. He presently is in Europe. The client does wish Mr. Schurtman to do all of the trial. He is due to come back, I believe, on March 8th, which would simply mean that if you set it down for some time during that week it is only a matter of delaying it.

THE COURT: I really couldn't do it next week anyway. In fact, I am a little hard pressed for a while.

(Discussion off the record.)

THE COURT: I am putting this down for March 17th at 11:30. That will be in Room 506. As I said, I am in Part I, but I think that I can have two pretty full days there.

What do we need beforehand? I am going to get -- I want whatever proof there is on all phases to be covered, except the October '73 settlement, to be dealt with first. Hopefully we can dealwith it all during those two days. I am considering that we will have Wednesday and Thursday.

What about the briefs on the law? What do you think you still have to brief, Mr. Prettyman?

MR. PRETTYMAN: I guess it really amounts to what your Honor feels that you need.

THE COURT: I tell you, I am going to assume that, regardless of how you phrase it, I think it is conceded that if a party produces and markets a record where a company like EMI or Capitol or Apple or all three of them have the rights, the exclusive contractual rights to market the artists' records, that is a violation of those rights for which damages can be granted.

I don't really see that we need a lot of breaching on that. I think it has just been apparent from the first day this case started. That is what this has all been about.

Under my finding it really isn't relevant -- I am still trying to see what I have to find about any possible distinction between the rights of Apple or EMI or Capitol, and I don't think I have to worry about that. I think you can maybe help me simplify that.

MR. PRETTYMAN: We are in a different posture than we were in before, because since Capitol and EMI and Apple are all in agreement about the interpretation of the contract, it seems to me that in effects it is none of the plaintiffs' business, if you will.

THE COURT: What I held is that regardless of any interpretation, there was no contract, and therefore there wasn't even the grant of the mail order rights, even if

Apple had it to grant, and therefore I think what we can very quickly and simply do is to have a framework where if there is to be a damage award for any of the things you talked about, such as loss of record sales and so forth, loss of record sales for the Rock and Roll album, loss of record sales for other albums, then I think you can really figure out how the damages should flow.

MR. PRETTYMAN: Sure, because, as I say, the defendants are all in agreement about it. It isn't as if the defendants didn't agree with how they should flow, in which case you would have to decide. The defendants are in agreement. If you think that, you know, $3 million goes because of that, then we simply divide it up according to how we have all interpreted --

THE COURT: All right. I am going to count on you, then. I am going to take it for granted that I am not going to have to sort out the mutual rights of thtese three corporate defendants or any of the defendants as far as damages, that whether it is compensatory or punitive, you four will work out the distribution. Right?

MR. PRETTYMAN: I am certainly amenable to that, and we would come back to you only if we couldn't, I assume.

MR. BERGEN: It is agreeable to me.

THE COURT: I am sure that that will be simplified.

MR. GRUMBACH: Yes.

THE COURT: If you --

MR. GRUMBACH: There is one other point that I should raise, your Honor. One of the claims that we have made is for counsel fees. That is a somewhat delicate matter.

THE COURT: Let's come to that. As far as the Lanham Act, you have given me your cases, and Mr. Kanzer wants the opportunity to brief that.

MR. KANZER: Yes. I don't think their cases go to counsel fees though.

MR. PRETTYMAN: No.

THE COURT: All right. On counsel fees, I think you better --

MR. PRETTYMAN: Yes, I better give you something.

THE COURT: The defendants better brief that and then the plaintiffs have a right to reply on that.

MR. GRUMBACH: The point that I was addressing really was does your Honor expect during the two days that you have set aside to have evidence on counsel fees or is that something --

THE COURT: Sure, absolutely. If anybody is going

to make an application for counsel fees they have got to make an application. So what I need from the defendants is all the material on counsel fees, if you are going to apply, and that means get up your time -- you know exactly what it is -- time, who did it, what did you do, and so forth, and be prepared on the day in question to get cross examined on it. I don't think you need to have depositions or any of that stuff. If anybody wants to put anybody on the stand they can do it during those two days.

So you are going to have the factual material on counsel fees, the brief on counsel fees, the brief on -- I don't think there is any other legal point.

MR. BERGEN: Only the one that I asked for, your Honor.

THE COURT: What was that?

MR. BERGEN: On the estoppel, the judicial estoppel.

THE COURT: All right.

MR. BERGEN: The question of whether they really have a right --

THE COURT: That goes to the amendment?

MR. BERGEN: Right.

THE COURT: All right. I think those are the only point of law I need from the defense side.

The plaintiffs' side --

MR. PRETTYMAN: Of course, we have an application for costs, but I assume that that would just come in the normal course.

THE COURT: The plaintiffs' side, I think the issue --

MR. KANZER: The Lanham Act, your Honor.

THE COURT: The Lanham Act, you want to respond on counsel fees.

I need to have everything in my hands no later than March 11th. When do the defendants want to have their materials? I think you better have your material in by the end of the day March 5th, filed and served.

MR. PRETTYMAN: March 5th?

THE COURT: Yes. Then you have slightly less than a week.

MR. KANZER: You wouldn't want me to have replies on counsel fees by March 11th, is that correct?

THE COURT: Everything, everything you want to reply to.

MR. KANZER: Okay, fine.

mmbr

THE COURT: Now, on the amendment, what are you claiming? Frankly, Mr. Kanzer, I don't think you can make any claim with regard to the second phase of the settlement, because that was tendered and really fused --

MR. KANZER: Your Honor, I would say that one might argue about whether there was substantial compliance. There certainly was not technical compliance.

THE COURT: The thing is that Mr. Levy contended that he had a new agreement and, naturally, he was not going to have performance at that time as a phase to the settlement; he was insisting on a new agreement.

Now, what you are trying to do is say, "Okay, defendants, if you win on your contention, that is, that there was no new agreement to replace the old agreement, then I ought to be able to get performance on my old agreement. Well, maybe that is fair enough. But it may be a little tricky exactly how that is done. One woldn't give your client damages for Phase 2 because you chose not to accept Phase 2. But maybe there is a right to reinstate it or get it performed or something.

MR. KANZER: I would assume we would still have the right to obtain part 2 at this point, and we have the right to indicate which masters we would accept the licenses for.

THE COURT: Let us not talk about damages for that. That is a waste of time.

MR. KANZER: If your Honor does not want to hear damages, I will not present it.

THE COURT: I couldn't even talk about damages for Phase 2. I wouldn't even bother going into that.

Now, as far as Phase I is concerned, it seems to me whether you want specific performance or damages. In other words, I think in your papers you got to spell out so we know what your position is and what you claim the law is that supports that position.

MR.KANZER: We are asking for damages, not specific performance.

THE COURT: On Phase 1?

MR. KANZER: On Phase 1.

THE COURT: Now, then, how did ycu measure the damages?

MR. KANZER: We intend to put on evidence as supplementing the evidence that has previously gone in as to what the economic value of the October 3rd settlement was and what the components of that settlement were and the portion and they would contribute toward that value. Your Honor, may recall, for example, that we sought to

introduce evidence concerning how the sales of a copyrighted sheet music might go up considerably after it had been recorded by an artist and your Honor did not allow us to put that in. We do, however, have evidence which we wish to bring in to show that if a prominent artist records a song, it is possible that it could have had almost no sheet music sales for years and years, but once it was recorded by a prominent artist or artists, then the sheet music sales went up tremendously. That would be part of the proof that we think we would certainly now be entitled to go into, even though your Honor did not previously allow us to do so for a different purpose.

I think we would be entitled to produce an expert, and we are thinking of putting on Mr. Grafalotsky, and that is subject to further discussion, as to giving his evaluation as to what he understood it was that his client was agreeing to and what value that is.

THE COURT: I don't think there is any briefing necessary on that.

MR. KANZER: I don't think so.

THE COURT: You have the estoppel point, Mr. Bergen.

MR. BERGEN: Since we had the benefit of no pretrial discovery or anything, or any documents, I think the

plaintiff should lay out what the proof is going to be and the basis before we walk in on March 17th, and any documents they have to support this. I think we also ought to have produced from them what the actual sales of sheet music of these songs have been.

THE COURT: We have not got a lot of time here. I agree with you. There is no rule that says you can't have discovery informally. Why don't you go and see Mr. Kanzer, and you cooperate with Mr. Bergen, Mr. Kanzer.

MR. KANZER: I am certainly willing to.

THE COURT: Do anything that you can do to lay out your case to him in advance. He knows what he is supposed to meet so the issues are reasonably defined. Do it informally.

MR.KANZER: I object to his comment --

THE COURT: You can have informal interrogation and discovery, and that is sufficient at this stage.

MR.KANZER: There has been discovery on this.

THE COURT: You just talk about it. He will pay you a call and you have the materials, and if you have already given him the things, you don't have to give them to him twice.

We will see you, then, on the 17th.

MR. BERGEN: May I just ask you one thing? On the brief we are going to submit on judicial estoppel, for personal reasons would it be all right if I got it to Mr. Kanzer the first thing on Monday, the 8th, and if he was given an extra day or so?

MR. KANZER: Your Honor, I have my own scheduling problems. I have a brief due to the Second Circuit on March 12th, which is Friday, and if I lose the weekend on that I am going to have a hard time to respond to anybody's papers. As it is, I am in an almost impossible situation. I just filed a brief in the Fifth Circuit yesterday.

THE COURT: Are we going to have figures that are very lengthy?

MR. BERGEN: I am going to put in something very brief, between five and ten pages on that point, and if I can keep it to five, it will be five.

THE COURT: I have the feeling that the only thing of any volume here will be the fee applications. I don't really care about having any of the legal briefs to me before the 15th. That is adequate, two or three days before the hearing is fine with me.

Now, that might help you.

MR.KANZER: That will help me tremendously.

THE COURT: Why couldn't everybody get their papers in, and, Mr. Bergen, if you got an out of town thing or something, why couldn't everybody comply with the March 5th date, except Mr. Bergen, and if you need until the end of the day on March 8th --

MR. BERGEN: That would be of tremendous help.

THE COURT: Then we can all go along on those fee applications, and if yours comes in a day or so late, at least, we got the bulk of them.

Then I think that if I have the fee applications in my office completed no later than March 8th, it is all right for you to wait until the end of the day on March 15th, 5 o'clock,March 15th, when you can give me your stuff.

MR.KANZER: All right.

Now, on the fee applications, are they simply going to submit a brief or is that brief going to include copies of what they intend to introduce on the subject of time, et cetera?

THE COURT: On the fee applications, I think that everybody is so familiar with the elements, that that would be a waste of time to brief, the elements. You got two questions here, whether they are entitled to

fees. That has to be briefed. The question of what standard of measurements to use on the fee applications I am sure are so familiar to you, that nobody has to lay it out. That is purely a question of fact.

MR. KANZER: That was not my question. In order to expedite the trial, it might be helpful if they are going to put into evidence time records, that they submit to us those records for our inspection ahead of time. If their records are anything like as detailed as the records I have kept, it would be a matter of taking hours to go through.

THE COURT: That is discovery. You ask them about that. They will help you out.

MR. KANZER: In other words, if they give me copies of the time records the same way as I am to give Mr. Bergen any material --

MR.GRUMBACH: I would be glad to give Mr. Kanzer records of the time, but our diary sheets, if that is what he is thinking about, have plenty of privileged items on them.

THE COURT: This is the oldest story in the courthouse You got to support a fee application. You just go through and make copies and excise the part that is privileged and sensitive.

He has got to know what you did.

If you got a fee, you got to produce what you did. You can work that out informally.

MR. BERGEN: Thank you, your Honor.

(Adjourned to Wednesday, March 17, 1976, at 11:30 a.m.)

III (K3)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BIG SEVEN MUSIC CORPORATION, et al.,

Plaintiff

vs.

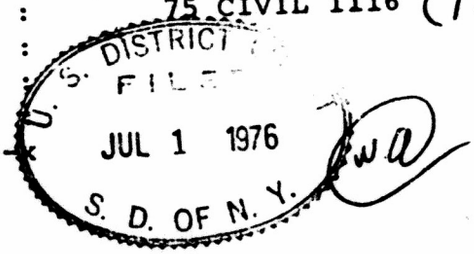
JOHN LENNON, et al.,

Defendants.

----------x

:Before:
:HON. THOMAS P. GRIESA,
: District Judge

75 CIVIL 1116 (T.P.G.)



New York, March 17,18,30,31, 1976
April 1, 1976

Vol#18

STENOGRAPHER'S MINUTES

(K3)

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

BIG SEVEN MUSIC CORPORATION, et al.,

Plaintiff,

-against- 75 Civ. 1116

JOHN LENNON, et al.,

Defendants.

----------x

BEFORE:

HON. THOMAS P. GRIESA,

District Judge

New York, New York
March 17, 1976 - 11:30 a.m.

APPEARANCES:

WALTER, CONSTON, SCHURTMAN & GUMPEL, P.C.
Attorneys for Plaintiffs,
BY: WILLIAM SCHURTMAN, ESQ.,
ALAN KANZER, ESQ.,
Of Counsel.

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER, ESQS.,
Attorneys for Defendants John Lennon and Harold Seider,
BY: JAMES M. BERGEN, ESQ.,
HOWARD P. ROY, ESQ.,
Of Counsel.

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APPEARANCES (Continued):

CLEARY, GOTTLIEB, STEEN & HAMILTON, ESQS.,
Attorneys for Defendant Apple Records, Inc.,
BY: GEORGE J. GRUMBACH, JR., ESQ.
JAMES MC HUGH, ESQ.,
Of Counsel.

HOGAN & HARTSON, ESQS.,
Attorneys for Defendants Capitol Records,
BY: E. BARRETT PRETTYMAN, JR., ESQ.,
Of Counsel.

- - - -

(Case called.)

THE CLERK: Plaintiffs ready to proceed?

MR. KANZER: Plaintiff's ready.

THE CLERK: Defendants ready to proceed?

MR. BERGEN: Ready.

THE COURT: Now, what do you propose as far as proof? We want to get evidence in today on the various subjects we talked about at the last hearing.

MR. PRETTYMAN: Yes, your Honor. I believe that the last hearing we indicated that Capitol would go first since its witnesses were in from the Coast and I might just outline briefly how I see this going.

First of all, I would make myself available for cross examination on the application for attorney's fees.

THE COURT: Let's hold the attorney's fees to the very last.

MR. PRETTYMAN: All right. Then I would propose that Mr. Menon, the president of Capitol, testify in regard to some general topics; that then Mr. Donald Zimmerman, who is now executive vice-president and chief operating officer, but who back in February was the senior vice-president of marketing, testify in regard to lost sales, and then that Mr. Harold Posner, who is director, financial planning and analysis, translate those loss sales figures into lost albums into actual lost profit and that would complete our presentation in regard to counterclaims except for one exception, and that is I might have an additional brief witness in regard to impact of the advertisement of the Roots album on television.

I will know more about that a little later today.

THE COURT: I would think that you would go, the way it seemed to shape up from our discussion last time, the purpose today primarily is to go forward with defendants' counterclaims, and then we also at an appropriate time are going to hear whatever evidence should be entered as far as the claim for breach of the 1973 agreement, and then I think the final order of business is the

application for attorney's fees, but anyway, that is the way it shapes up in my mind.

MR. PRETTYMAN: Your Honor, I thought that from our last discussion it was going to be a little bit different for this reason:

Of course, our side has no interest in the counterclaim, in the various claims in regard to the prior agreement, and I thought therefore that we would present all of our counterclaim testimony including attorney's fees before that kind of separate hearing began.

THE COURT: Okay. Whatever is convenient.

MR. PRETTYMAN: I wasn't even going to be present for that. I just considered that a separate matter.

THE COURT: Well, maybe that is the way we laid it out. That is probably acceptable.

MR. GRUMBACH: Your Honor, that was my understanding too.

THE COURT: Why don't you go ahead with your witnesses.

MR. PRETTYMAN: I will call Mr. Menon to the stand.

MR. KANZER: I do have a preliminary point, your Honor. First of all I have found that inadvertently we have missed page 5 in one of our briefs.

THE COURT: Hand it up. We will insert it.

MR. KANZER: Second, your Honor, we were served with a reply by Mr. Lennon's attorney's to that brief which we got about 10:30 today, and shortly after we got to court, almost 11:30, we were served with a reply from Mr. Prettyman to the Lanham Act claims.

We have not had an opportunity to look at these yet, your Honor, and I don't know, there may be material to respond to.

THE COURT: We have another flurry of briefs we are involved in now. I wish you would just relax on the briefs, and I think that perhaps the legal issues will be clarified as we hear the testimony. Let's concentrate on testimony right now, the conclusion of the testimony, or maybe one stage or another we will discuss issues of law, and we will see if there is any need for any further briefing.

If there is, you are not going to be denied the opportunity. But maybe we can get the legal issues simplified so that we don't have to have continual barrages of briefs.

MR. KANZER: I would however like to state, your Honor, that Mr. Lennon's attorneys do point to a factual misstatement in one of our briefs, and I

don't want to acknowledge that. Inadvertently we had not realized ads did go on beyond the initial weekend. That was an inaccurate statement.

THE COURT: Thank you very much.

Okay Mr. Prettyman.

MR. PRETTYMAN: I might say, your Honor, that the brief we filed this morning at the Court's request was, although it was denominated on behalf of Capitol and EMI, it is of course filed on behalf of all the defendants since they are now all claiming --

THE COURT: All right.

MR. PRETTYMAN: Mr. Menon, please.

B H A S K A R M E N O N, called as a witness by Defendant Capitol Records, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PRETTYMAN:

Q Mr. Menon, the acoustics are not very good in this courtroom so we are all going to have to keep our voice up so that both the Judge and the reporter can get everything clearly. Would you give your present title, please.

A I am president and chief executive officer of Capitol Industries, EMI, Incorporated.

THE COURT: Let me just go back. I was concentrating on something else. The spelling of your name is what?

THE WITNESS: The first one is B-h-a-s-k-a-r.

THE COURT: And the last name?

THE WITNESS: M-e-n-o-n.

THE COURT: And your office is what?

THE WITNESS: I'm president and chief executive of Capitol Industries, EMI.

THE COURT: Capitol Industries?

THE WITNESS: Yes. I'm also president of Capitol Records, Inc.

THE COURT: Is one of those companies a subsidiary of EMI?

THE WITNESS: Yes, sir, it is; the first, Capitol Industries is. Capitol Records is a subsidiary of Capitol Industries.

THE COURT: Okay.

Q Where is Capitol Records' principal place of business?

A In Hollywood, California.

Q And its business?

A Manufacture and distribution of phonograph records.

Q And when you speak of phonograph records, do you include tapes within that description?

A I do.

Q What is the relationship between Capitol Records, Inc. and Capitol Industries EMI, Inc.?

A Capitol Records, Inc. is a wholly-owned subsidiary company of Capitol Industries EMI.

THE COURT:You call it Capitol Industries.

MR. PRETTYMAN: I think the full name is now Capitol Industries EMI, Inc. and we will call it Capitol Industries for short, if that is permissible.

THE COURT: Let's go.

BY MR. PRETTYMAN:

Q And it is Capitol Industries which is the subsidiary of EMI, is that correct?

A Yes.

Q Is there any relationship between EMI Limited and EMI Records Limited?

A EMI Records Limited is a wholly-owned subsidiary of EMI Limited.

Q And what business is EMI Records Limited in?

A EMI Records Limited is a manufacturer and distributor of phonograph records and tapes in the United Kingdom.

Q Did you ever work for EMI Limited?

A I did.

Q And during what period of time?

THE COURT: Let me go back, please. I wish somebody would draw a chart. These corporations, there is a hierarchy of corporations -- because I'm having a little trouble understanding you, and I am not sure I am getting the full titles, and punctuation and all that.

MR. PRETTYMAN: I think perhaps the easiest thing for us to do is let Mr. Menon prepare a little chart. We had done that before, your Honor, and he didn't take the stand and we didn't submit it and I don't have it with me, but he can easily prepare a chart which I will submit and mark as an exhibit.

THE COURT: Why don't you do that?

MR. PRETTYMAN: Do you want to stop now and do it?

THE COURT: Yes, let's do it.

MR. PRETTYMAN: Okay.

(Pause.)

THE COURT: Mr. Menon is Exhibit CR for identification a chart you have just made out representing the relationships of certain EMI and Capitol companies?

THE WITNESS: Yes.

THE COURT: And this is correct?

THE WITNESS: Yes, it is.

THE COURT: I will receive Exhibit CR.

(Defendant's Exhibit CR received in evidence.)

THE COURT: Did you ever work for EMI Limited? I believe you did. I would like to know in what capacity and during what period of time.

THE WITNESS: I worked for 100 per cent owned subsidiary of EMI Limited, originally from 1956 to 1970. I also worked directly for EMI Limited in London from 1970 to 1971.

THE COURT: This is a huge room, as you know, and I think you will just have to talk louder if you possibly can and a little slower, and if anybody wants to move their seats, to sit nearer the witnesses, you can do it, because it is a very difficult room to proceed in.

But you speak to me and Mr. Prettyman can get up close to you so he hears, but I have got to hear you, so you speak to me and speak loud, all right?

THE WITNESS: Yes.

MR. PRETTYMAN: Do you want the last answer read to you?

THE COURT: Yes, please, last question and

answer.

(Record read.)

Q Now, what were your duties from 1956 to 1970?

A I was, during different periods, I was commercial manager, managing director, chairman of the EMI subsidiary company in India.

Q And in that capacity did you deal in any way with the sales of records and tapes?

A I did.

Q And what did you do between 1970 and '71 when you were working directly for EMI?

A I was managing director of a company that, a subsidiary company which was responsible for EMI's interests, national interests, interests outside the United Kingdom.

Q And again this related to the sales of records and tapes?

A It did, very largely.

Q What did you do in 1971; did you take a new position?

A Yes. I transferred to Capitol Industries in Hollywood, California.

Q And what position did you assume then?

A Originally as president of Capitol Records

and executive vice-president of Capitol Industries, and soon after as president of Capitol Industries.

MR. PRETTYMAN: Your Honor, are you getting this better now?

Is his voice up?

THE COURT: Yes.

MR. PRETTYMAN: If you will just maintain that tone, then, Mr. Menon.

Q Do you know John Lennon?

A I do.

Q How long have you known him?

A Five years.

Q Is Mr. Lennon at present under any contractual relationship with Capitol Records?

A He is not.

Q Is he at present under any contractual relationship with EMI?

A He is not.

Q Was he previously under such contractual relationship?

A He was with EMI Records.

Q When did that contractual relationship end?

A I believe on the 26th of January 1976, this year.

Q Why did it end?

A It was the termination date of the last agreement or contract that existed between Mr. Lennon and EMI Records.

Q And the contractual relationship has not been resumed since?

A No.

MR. PRETTYMAN: Your Honor, at this point I would like a little direction from the Court.

You indicated last time that you did not intend to make a finding in regard to whether there was in fact an exclusion that related to mail order. My own feeling in terms of my own case is that while it is not necessary for you to make that ruling, I would perhaps in the event of appeal feel stronger if I closed that loop-hole in terms of Mr. Menon's testimony, that is, that I would have him testify that in fact Capitol believed in good faith, that it did have exclusive right in regard to mail order and I don't want to violate your Honor's directions so I am just looking -- if allowed to proceed, I will ask him how Capitol interpreted the contract and whether it actually worked under the contract pursuant to that understanding.

MR. KANZER: Well, your Honor, we would object

on the grounds that Mr. Menon's understanding or even Capitol's understanding are not really at issue at this point.

THE COURT: I will tell you, I remember quite vividly two things. One, you had Mr. Menon in court during the earlier proceedings, and secondly, at the time of the oral argument, I was addressing certain questions to you, and I think it became apparent at that time that probably in order to just really complete the evidence on the points we were talking about, it would have been of some benefit to have testimony by Capitol on its interpretation and usage under these agreements, or Capitol and EMI, whatever.

However, it wasn't put in. If I had felt it was necessary in my opinion, I would have called for it, and I think that it probably is a little -- I think we should rest on those issues and not put in evidence at this point because people did rest on those issues, and I think we had better consider -- it is one of those things, I don't think it was essential, I must say to you.

MR. PRETTYMAN: I agree with your Honor on that. I guess in terms of the counterclaims if I could at least ask him whether Capitol, when it sent the telegrams to the radio stations, and to Mr. Levy,

believed in good faith that they had the rights that they were asserting, I would at least like to show that because I think good faith does relate to our counter-claims.

THE COURT: Okay.

MR. PRETTYMAN: I will proceed with something else while they are getting that.

THE COURT: All right.

Q Mr. Menon, would you explain for us the relationship between Capitol and EMI as it directly relates to the production of a Lennon album, that is, who assumed what costs, who makes what repayment to whom, who does the pressing, the details of exactly how that relationship works in terms specifically of a Lennon album while he was still under contract with those companies?

A Mr. Lennon is a directly contracted artist to EMI Records and by the terms of his contract with the EMI Records during that period --

THE COURT: With EMI?

THE WITNESS: With EMI Record.

THE COURT: In other words, his contract was with EMI Records?

THE WITNESS: Yes.

THE COURT: Okay.

THE WITNESS: EMI Records pays for the recording costs that are involved in Mr. Lennon's albums. They are also the owners of the masters of such recordings. Capitol, in turn, through the agreement that Capitol entered into with --

THE COURT: Excuse me, EMI pays recording costs.

THE WITNESS: Yes, sir.

THE COURT: EMI owns the masters?

THE WITNESS: Yes.

THE COURT: Go ahead.

THE WITNESS: Capitol, through its licensing agreement with Apple Records, Inc., New York, and also based on an agreement between EMI --

THE COURT: Go ahead.

THE WITNESS: And also based on an agreement that existed or exists between EMI and Apple Records of New York, Capitol acts as the distributor of Mr. Lennon's recordings in the United States and Canada.

The functions that Capitol discharges in this role is that of physically manufacturing the records --

THE COURT: Capitol physicall manufactures?

THE WITNESS: Yes. It distributes, markets, promotes and in all other manner supports the sales of

such records in the two territories that I have mentioned. All costs that are attendant upon those functions are borne by Capitol as the marketing company in the United States and Canada. All costs that are attendant upon the production of the original sound recording is borne by EMI.

In many instances --

THE COURT: Wait a minute. In other words, does Capitol bill EMI for the costs of making the record?

THE WITNESS: Making the recording, your Honor, the original sound recording that is made in a studio, there are costs that are attendant upon that, such as costs of musicians, costs of studio time.

THE COURT: When you said Capitol physically manufactures, you weren't talking about the making of the recording?

THE WITNESS: No, I was talking about the disc and the tape, the configuration in which the original recording is in fact duplicated and marketed to the public.

THE COURT: So what you have -- let's just get our nomenclature -- you have got distinct stages as follows, as I understand it:

You have got the making of the recording which involves Mr. Lennon and the other artists performing, and that goes on to a tape, right?

THE WITNESS: Yes.

THE COURT: And that has some studio costs and paying musicians and so forth. All of that is borne by EMI, right?

THE WITNESS: Yes.

THE COURT: Now where does Capitol's responsibility take over?

THE WITNESS: In terms of the physical process, if that would clarify it, the tape is then required to be duplicated, either in the form of flat discs which is the disc album, or in the form of prerecorded tape, which is either in a eight-track configuration or in a cassette.

THE COURT: You are talking about the final product which is put on the market?

THE WITNESS: Right.

THE COURT: The manufacture of the final product at that point, that manufacturing process, the duplication in discs or tapes is done by Capitol?

THE WITNESS: Yes.

THE COURT: To the extent that the record is produced for United States distribution?

THE WITNESS: And Canada.

THE COURT: What?

THE WITNESS: And Canada.

THE COURT: Okay. I think I have it.

BY MR. PRETTYMAN:

Q To clarify one point, when you said that EMI bore the cost up until the final pressing process, is it a fact that Capitol pays those costs first, and then transmits billings to EMI for repayment?

A Yes. Capitol has done so as a matter of convenience where the sound recording is in fact done in the United States, and Capitol advances those payments on behalf of EMI and then retrieves it from EMI.

Q And in fact, in relation to the Rock 'n' Roll album, did Capitol receive various billings in relation to the cost of the recording and then transmit those costs to EMI for reimbursement?

A Yes, I believe Capitol received the billing, paid the bills, and charged EMI for the sums concerned and received payment from EMI, reimbursement from EMI.

Q Now, did you ask your company to prepare a list of those costs that related to this album which Capitol first paid and then obtained reimbursement from EMI?

A I did.

Q And to whom did you make that request?

A I asked Mr. Vaughn Burdick of our contracts administration department.

Q And did he prepare a list at your direction?

A He did.

MR. PRETTYMAN: I would like this marked.

(Defendant's Exhibit CT marked for identification.)

MR. PRETTYMAN: There are also figures on the back, your Honor. I will have them explained.

THE COURT: Why don't you show them to Mr. Schurtman and Mr. Kanzer.

MR. PRETTYMAN: I have.

THE COURT: Are you offering this?

MR. PRETTYMAN: I want to ask him about it first.

THE COURT: All right. Ask him.

Q Would you explain what this is and also would you explain the significance of the handwritten numbers on the bac; is that your handwriting?

A Yes.

Q And did you get this information from Mr. Burdick?

A I did.

Q Did you get it after this exhibit was originally prepared?

A Yes.

Q Would you explain now the signficance of the exhibit. I don't mean you have to go down each number here, but if you would explain generally what this is, and also the significance of the figures on the back.

A This is a schedule that lists on the first column on the left a brief description of the charges that were covered by various invoices that Capitol received in connection with the recording of the Rock 'n' Roll album. There are brief descriptions of the purposes, such as musicians costs, studio hire and other such.

Right across the sheet there is an identification by date of when some of these invoices were received, and against each one of the charged heads an amount is stated.

It is all then totalled up against each of these headings on the extreme right-hand corner, and there is a grand total at the end of the whole thing, at the extreme right-hand bottom corner.

On the front side of the sheet, there is a listing of all bills that were paid with respect to this particular album, till the 26th of December 1974.

We were, however, aware that certain further charges with respect to the production of that album

had been received since that date, and --

THE COURT: Wait a minute. The face of the exhibit carries the costs through what date?

MR. PRETTYMAN: December 26th, your Honor.

THE COURT: Of what year?

MR. PRETTYMAN: 1974.

THE COURT: What does the back do?

THE WITNESS: The back takes into account five further items of payment that were made with respect to that album, recording costs with respect to that album, after the 26th of December 1974.

Q In other words, the invoices were received and paid and passed on to EMI after December 26, 1974?

A That's right. And it indicates the amounts involved thereof.

Q So am I correct, then, that the total amount, the total cost of the album, which was first paid by Capitol, and then passed on and reimbursed by EMI, is $195,768.18 plus $7,765.48?

A Yes.

MR. PRETTYMAN: I'm sorry that I can't add that up very quickly myself. Your Honor, do you want to see this?

THE COURT: So you are suggesting that you add this total of $195,768 to 7,765, is that right?

MR. PRETTYMAN: Yes, sir.

MR. GRUMBACH: $203,533.

THE COURT: Thank you.

MR. PRETTYMAN: I offer that, your Honor.

THE COURT: Any objection.

MR. KANZER: No objection.

THE COURT: Received, Exhibit CT is received.

(Defendant's Exhibit CT received in evidence.)

Q Mr. Menon, if I can take you back to the period in 1974, when you first discovered that the Roots album would be produced and put on the market, was there a discussion at that time among Capitol personnel as to the projected price -- I'm sorry, 1975 -- was there a discussion among Capitol personnel in regard to the projected price of Capitol's own proposed rock and roll album?

A Yes, there was.

Q Now, where did that discussion take place, and when did it take place?

A There were a number of discussions during a period of about a week at the end of January, 1975.

THE COURT: End of what?

A Of January 1975. And the discussions took place

both in my office in Hollywood, California, as well as in New Orleans where a group of us happened to be during the first week of February.

THE COURT: So it was January 1975 and first week in February, right?

THE WITNESS: Yes.

Q Now, who participated in the Hollywood discussions?

Mr. Brown Meggs, who was at that time the --

THE COURT: How do you spell his name?

MR. PRETTYMAN: M-e-g-g-s.

THE COURT: First name.

MR. PRETTYMAN: Brown.

THE COURT: Who was he?

THE WITNESS: He was at that time the Executive Vice President of the record company and its chief operating officer of Capitol records.

Mr. Don Zimmerman, who was at that time the Senior Vice President responsible for marketing, and is now the chief operating officer of Capitol Records, and Mr. Al Coury, who was at that time Senior Vice President of Artists and Repertoire, between the four of us.

Q Who participated in the New Orleans discussions?

A In New Orleans, it is myself, Brown Meggs and

Al Coury, but we spoke fairly extensively, I think, on the telephone with Mr. Don Zimmerman, and at that time with our financial analysis department, particular Mr. Hal Posner, who was director of that department.

THE COURT: What's his name?

MR. PRETTYMAN: P-o-s-n-e-r. He will be testifying, your Honor.

THE COURT: And who is Mr. Posner?

A He's the director of our Financial Planning Division in Capitol.

Q Before we get to whatever question was posed to Mr. Posner, would you tell us the purport of the conversations that were had about the proposed price of the rock and roll album.

MR. KANZER: Objection. Hearsay, your Honor.

THE COURT: What's the relevance of all this?

MR. PRETTYMAN: The relevance is that this album would have been sold for 6.95 except for Roots.

And I'm claiming damages for the difference.

THE COURT: Objection overruled.

A As soon as we had reason to believe that Mr. Levy was intending to put out --

THE COURT: You were asked about the discussions. What were the discussions?

A Well, the discussions really arose from the point at which we became aware that a television package was proposed for release by Mr. Levy and the purport of it was to try and determine what, in relation to that development, what Capitol's pricing policy should be for its own rock and roll album.

The only reason for the discussion ever having been undertaken was the fact that we had knowledge of the possibility that this Roots album might be put out by Mr. Levy. If that had not occurred obviously we would have gone out with our standard recommended retail price at the time.

MR. KANZER: May I just point out another objection.

When Mr. Prettyman, on February 27 stated what the elements of damage that were going to be claimed by Capitol were, he did not at all make any reference to this as being such an element, and I do think that it is not in the pleadings either and we are certainly taken by surprise by this.

MR. PRETTYMAN: Your Honor, our discussion at our last meeting was quite general and was attempting to touch primarily on the legal bases for the claims that we would make.

I certainly was not purporting to say in detail

what the evidence would produce in regard to all measures of all elements of damage and --

THE COURT: I'm not going to force any cut off. We did the best we could at that point.

MR. KANZER: Your Honor, may I also point out that during discovery, when I took the deposition of Mr. Menon I asked Mr. Menon very specifically what Capitol's damages were, and what elements went into that, and he made no reference whatsoever as to this being an element of those damages.

THE COURT: What about that.

MR. PRETTYMAN: Your Honor, I don't recall specifically what Mr. Menon said, but he can certainly be cross examined in detail about whatever he may or may not have said in his deposition.

That is a question of cross examination. But as I recall his testimony during the deposition, it was that he did talk about the elements that went into the decision on price, and he is going to elaborate on that right now and explain precisely what that was. He was not asked --

THE COURT: If there was a discovery attempting to get a specifics of the damage claims, and if you didn't disclose it, then I think that is a problem. Now, as far as the conference we had on February 27, I wouldn't think

that that was such a formal thing as to bar amends, but I do think that if Mr. Schurtman and Mr. Kanzer deliberately tried to obtain specifics of damage claims on the counterclaims and this damage claim was not revealed, that might present a problem.

What's discovery supposed to be for?

MR. PRETTYMAN: I will just have to wait to see what they produce in terms of what the question was and what the answer was.

THE COURT: I will take the evidence but subject to a motion to strike.

MR. KANZER: Could we right now address our attention to on page 256 of Mr. Menon's deposition where according to my notes he was asked what his damages were, and he did not make any reference to --

THE COURT: What do you refer to?

MR. KANZER: I can either turn to my notes, but I prefer to turn to the deposition itself.

THE COURT: Okay.

MR. PRETTYMAN: What page?

MR. KANZER: I believe if my notes are right, it is at 256. The question was, starting at page 255, looks line line 21:

"Question: What is the basis for the calcula-

tion of Capitol's damages that are alleged in the counterclaim in either the State or the Federal Court action?

"Answer. Based on an assessment of the minimal damage we estimate we have suffered with respect to the injury to the artists' reputation and standing, which this appalling package has done, with respect to its works that are already on our catalogue, the future of those, damage done with respect to the artist's future releases, that which has been done to the rock and roll album currently being sold, damage that has been done to artists who have been closely allied with Mr. Menon, the other Beatles, both in the public mind and in the mind of relevant sections of constituents of the record business, such as I named previously, radio stations, the Press, the rock Press, retail trade and others, damage that has been done to those associates as a group, which constitute the Beatles catalogue, probably beyond any question the most valuable asset in the music business ever, damage that is done to the individual recordings made by the individuals who constituted the Beatles, Mr. Paul McCartney, Mr. Harrison, Mr. Ringo Starr, those are the damages that come to my mind at the present time."

Now, we have never had any supplementation of that statement.

MR. PRETTYMAN: Your HOnor, I think it is perfectly clear that unlike the answer to an interrogatory, this question was geared more to damage to the performer and to the people with whom he is associated, such as the Beatles and so forth, than it was to name the specifics of each amount of money that you claim that you owe.

Moreover, an answer like this, a general answer of this kind I think would even include, because he is talking about things such as the harm that has been done to this and future releases, and now we are trying to tell you precisely the elements of that harm.

So you can't substitute a general question and a general answer like this for a claim that the witness under cross examination did not come up with every single element of damage.

We have said repeatedly, as we did in our counterclaim, that we were claiming a minimum of $300,000 on each of the --

THE COURT: When is the first time you had ever-- when did you first decide to present this element of damages that we are talking about now?

MR. PRETTYMAN: Well, we decided it when we sat down in order to actually compute our counterclaims, the first time it really became relevant was for this hearing,

and the time we sat down really to compute them specifically was for this hearing. And I would like to remind you that in terms of Mr. Levy's damages, exactly the same thing has occurred, that, for example, in terms of what he's going to present here to you later, he has never identified the specific elements of it, none of us have.

THE COURT: I'm afraid, Mr. Kanzer, I think it is certainly an objective of discovery to pin down claims if somebocy really asks a question and gets something pinned down, but the witness on page 256 of the deposition says, "These are the damages that come to my mind at the present time."

I don't see foreclosing a reevaluation of that. I would think that maybe some of those things will be taken out.

Anyway I'm going to overrule the objection.

MR. SCHURTMAN: May I call your attention to two points?

THE COURT: Okay.

MR. SCHURTMAN: Rule 26E of the Federal Rules specifically requires a witness to supplement his prior responses if he decides to put in supplementary testimony. So tne rule is quite clear that discovery has to be supplemented before trial otherwise we are foreclosed from con-

ducting any discovery on this damage issue.

Furthermore, I'd like to call your Honor's attention to the pleadings, in our complaint we alleged as part of our antitrust claim, in paragraph 31, "On information and belief, Capitol album is priced at $5.98, a dollar below Capitol's normal price for comparable albums."

The response to that in Capitol's answer was, in paragraph 18 of the answer, "Admits that a sum used by Capitol in connection with the Capitol album is 5.98; states that Capitol is distributing the Capitol album in accordance with proper marketing practice and denies the other allegations."

MR. PRETTYMAN: That is consistent with his testimony here.

MR. SCHURTMAN: I don't think it is consistent at all. It is completely inconsistent.

MR. PRETTYMAN: You haven't heard him testify yet.

THE COURT: Wait.

MR. SCHURTMAN: In the pleadings we are told 5.98 was a perfectly normal price. They denied our allegation that it was not normal. They told us it was normal.

THE COURT: What was your allegation?

MR. SCHURTMAN: The allegation was on informa-

tion and belief, that a Capitol album is priced at 5.98, a dollar below Capitol's normal price for comparable albums.

THE COURT: Read the words again.

MR. SCHURTMAN: On information and belief, the Capitol album is priced at 5.98, a dollar below Capitol's normal price for comparable albums.

THE COURT: What was your point there? Just explain that to me, how did it relate --

MR. SCHURTMAN: They responded to it by saying--

THE COURT: How did it relate to your antitrust claim?

MR. SCHURTMAN: It related to the fact that they were engaging in predatory pricing to compete with the Roots album.

THE COURT: What was the Roots album priced at?

MR. SCHURTMAN: It was 4.98 because it was a television album, and we said that in order to compete against it they were charging a dollar below their normal price.

It at that point their theory had been yes, we are charging a dollar below the normal price because you are forcing us to do it, they could have said so in their pleadings.

THE COURT: What did they say?

MR. SCHURTMAN: What they said was, they admitted the 5.98 and they said:

"Capitol states that Capitol is distributing the Capitol album in accordance with proper marketing practice."

Not a word about the fact that we had forced them to cut it by one dollar.

THE COURT: I think there is no doubt that in connection with preparing for the present hearing Capitol and its attorneys have resurveyed the situation, and they are coming up with a theory that they have never really considered before. We talked about damage at the hearing on February 27, and certainly it was mentioned in the deposition.

MR. PRETTYMAN: It is right here in our amended statement, your Honor.

THE COURT: When did you give us that?

MR. PRETTYMAN: That has been filed for some time, Defendant's amended joint statement of facts disputed and facts not disputed.

I don't know the date of it, but that's been on file.

MR. BERGEN: Before the trial, your Honor?

MR. PRETTYMAN: January 26. And I will just

read it to you.

THE COURT: Okay.

MR. PRETTYMAN: The price of the album, 5.98 had been decided upon in part because the songs on the album were titles previously recorded by other artists rather than new songs, and in part because of the competition from Root which was to be sold for 4.98.

So we clearly put them on notice.

THE COURT: Is it specified as a damage claim or something?

MR. PRETTYMAN: No, but I would point out to you that at no point are we asked that.

In this question here he's not talking about figures in his deposition, not a single figure was named.

THE COURT: It's just one of these things where people have new thoughts. Let's face it. You have presented this theory which you did not obviously think of before.

Now are they cut off or aren't they? And the only thing is, Mr. Schurtman, I think that -- I don't know particularly why you are prejudiced. I think that you did ask or Mr. Kanzer asked the question, but it was asked of a witness at a deposition which is not the most formal, deliberate thing in the world, and he really left himself

open at the end. It was never amended, and I don't really see a basis, frankly, for declaring there to be some formal cut off.

Furthermore, I don't know why you are prejudiced. You don't like to have the damage claim in, but aside from that, the prejudice to you in discovery and proof is what?

MR. SCHURTMAN: We haven't had any discovery --

MR. PRETTYMAN: May I conclude --

THE COURT: I will hear both of you.

MR. SCHURTMAN: Your Honor, they have several attorneys on their side. We represent three parties.

THE COURT: Go ahead.

MR. SCHURTMAN: We are prejudiced in the sense that we have not had discovery on that issue.

Mr. Menon is now going to tell us about some conversations which were held in Los Angeles, and in, was it New Orleans, about which we know nothing.

We have never questioned any witnesses about it. He can tell us anything he wants now. I think it definitely inhibits our ability to cross examine him.

THE COURT: What discovery would you have taken had you known?

MR. SCHURTMAN: We would have found out, first of all, what these alleged conversations were, if the wit-

ness had even thought of them or remembered them at that time, and we would then have tried to pick out some way to rebut the argument that the only reason they cut the price by a dollar or one of the reasons, was because of what we did.

THE COURT: Mr. Schurtman, I don't think it is probably all that complicated. If you need to have some proof that isn't here, there are lots of ways to solve that. You can get a witness flown in or something like that.

I'm going to overrule the objection, but reserve the opportunity to hear you about prejudice or need for help on this issue.

Okay, let's go.

MR. PRETTYMAN: Your Honor, so that there will be no confusion about this, I want to just add two brief points.

Number one, they specifically asked him in his deposition at 247:

"What was the basis for deciding to have a suggested retail price of 5.98?"

And part of his answer related directly to the unauthorized parroted version of this album.

Now, that is precisely what I'm about to get in there, and they could have explored that in great depth.

Secondly, in our responses and objections, Defendant Capitol Records, to plaintiffs' first set of

interrogatories, when they asked us to state when the suggested retail price was first established, we said, February 7, '75, and we talked, they asked for the people who discussed it.

The answer was Menon, Meggs, Coury and Zimmerman. And when they asked for the meetings held concerning it, we mentioned the meeting in New Orleans attended by the above gentlemen.

So I think they were on plenty of notice that that was the discussion we were about to have was part of this testimony.

THE COURT: I'm overruling the objection. Go ahead.

Q Will you then tell us, sir, the basis of the 5.98, please, and I think we can begin by telling us what Capitol's normal price at this particular time was for a retail album.

A Capitol's normal recommended retail price for that category of album was $6.98. And the basis of setting a suggested retail of $5.98 for the Rock 'n' Roll album flowed directly from our having been confronted with the Roots album on television being offered to the public at $4.98.

The situation was further aggravated by the fact

that general market conditions in the record business in the U.S. at the time was under pressure from the recession and that heightened our concern.

The recording in question featured new performances but of old compositions. It was not of entirely new material, and that again heightened our concern.

But the primary determinate of the 5.98 price which was a dollar lower than our prevailing, still prevailing, recommended retail price, was the fact that the Roots album we had reason to believe was due to be advertised and offered to the public for sale on television or through television at 4.98.

Q Would you have allowed the Rock 'n' Roll album to remain at the normal 6.98 price if you had not been faced with the Roots album?

MR. KANZER: Objection.

THE COURT: I'll overrule the objection.

A Unquestionably it would have been at 6.98.

Q Did you make a telephone call to anyone within the Capitol organization from New Orleans to determine whether you could still make a profit at 5.98?

A I did.

Q And who did you call?

A I believe I called Mr. Hal Posner.

Q And did you get a reply to that either in New Orleans or later?

MR. KANZER: Your Honor, could I at least have a continuing objection to this whole line of hearsay?

THE COURT: All right.

A Yes, I did.

Q And on the basis of the reply that you received did you make a final determination of what the price of the Rock 'n' Roll would be?

A Yes.

Q And what was the final determination?

A To set it at a suggested retail price of $5.98.

Q Was it any part of your consideration -- let me ask you this first:

In the normal course of putting out Rock 'n' Roll, would you have placed advertisements for it on television?

THE COURT: I'm sorry, what was Mr. Posner's answer?

MR. PRETTYMAN: I didn't ask him, because I'm going to have Mr. Posner on and he's objecting to hearsay. I can ask him now if you want.

THE COURT: You testified that you called Posner to see if you could make a profit.

What did he answer?

THE WITNESS: The answer was that we could at certain levels of sales.

THE COURT: All right. Go ahead.

Q My question was, in the normal course, would you have advertised on television an album such as Rock 'n' Roll?

A Just advertisements.

Q Yes.

A Very likely, yes.

Q And had you in fact advertised on television for prior Lennon albums?

A Yes.

Q And were you at all affected in your decision of price by the fact that Roots, you understood, was to be sold through television?

A Very much so.

Q And what was your feeling in that regard, did you feel that that would cramp you in any way? What was your feeling about the effect that the Roots album advertisement on television would have in regard to your own plans?

A Well, it would have caused wide-spread confusion in the marketplace, where allegedly the same recording was being offered to the public at --

THE COURT: I'm not hearing you.

THE WITNESS: Where allegedly the same recording as our Rock 'n' Roll album was going to be offered to the public at $4.98; our options at that time, in as far as there is by and large a significant overlap in the marketplaces that both the albums were serving, was that of distributing through the normal retail trade, which is the manner in which we distribute our products by and large, and certainly we were intending to do so with respect to this album, but at a price that would have been in some form compatible with this other 4.98 phenomenon that had just arisen.

It brought severe questions to our mind about the impact which the 4.98 Roots album and its propagation over television would have on the minds of our principal customers, both our retail and our rack customers, who we had every reason to believe were fully aware of the Roots album or its forthcoming offer to the public, and we were concerned about the impact of that information on our salesmen, and most importantly, the impact of it when it was published on the public.

Those were the concerns that we had when we became aware of this, of Roots coming out.

Q Did your knowledge of the impending distribution

Roots have any impact upon the speed with which you put out the Rock 'n' Roll album?

A Yes, it did, very markedly.

Q And would you tell us what the effect was and precisely what happened as a result of that?

A Well, it became imperative, as soon as we had reason to believe that the Roots album was about to be advertised on television, it became imperative for us to manufacture, distribute and place in areas of retail sales throughout the country and as fast as possible, our own album, the Rock 'n' Roll album, and indeed we took special measures to rush out the album in terms of manufacturing its jacket and the physical disc itself and the tapes, and getting it out into the marketplace as fast as possible.

I would say by any standards that I have ever know, it was what one might describe as an abnormally fast speed, entirely in order to counter the impact of the Roots advertising on the public being exposed to it.

THE COURT: Can't we now get the chronology, because just general descriptions of speed aren't going to help me very much, and I think we had better get very clear on the chronology of your album versus these events.

Q Can you tell us generally when it was first anticipated that Rock 'n' Roll would be put out prior to the

time that you knew that Roots was coming out?

A I'm not --

THE COURT: Not anticipation. When did you start working? This recording was finished around October 25, are you aware of that?

THE WITNESS: No, sir.

THE COURT: Are you now aware of it?

THE WITNESS: No, sir, I believe that --

THE COURT: When I say the recording, I mean whatever -- the work by the artists, we now have in the record the playing of the music into the tape was finished by October 25. You are now aware of that, right?

MR. PRETTYMAN: Your Honor, I'm sorry, but you recall that while things would happen in October in terms of sending the tape to Mr. Coury at Capitol, that that --

THE COURT: I'm asking about the finishing. I want to know what Capitol did, if anything, after October 25 or didn't you do anything until the end of January?

THE WITNESS: In terms of getting the record manufactured and distributed, we did not do anything until about the, until the very end of January.

THE COURT: Why not.

THE WITNESS: Well, we had no reason at that time to -- we had not set a release date.

THE COURT: You hadn't what?

THE WITNESS: We hadn't set a release date for the album.

THE COURT: Why not?

THE WITNESS: We just didn't have it in our forward plans at that time and we thought we would put it out sometime in the following months. There was no risk known to us at that time of the Roots album, sir.

THE COURT: I just want to get a little broader picture of this.

I mean Capitol had paid $90,000 or something like that to get some tapes back from Phil Spector, right?

THE WITNESS: Yes.

THE COURT: And so Capitol knew that Mr. Lennon was working on this album, right?

THE WITNESS: Yes.

THE COURT: Did you know or did somebody at Capitol know that he was recording music in October to finish up that album?

THE WITNESS: Yes.

THE COURT: You got the bills and so forth?

THE WITNESS: Yes, we did.

THE COURT: And what conversations were going on from Capitol's standpoint back in October? Was it just

a completely dead thing, or what was it?

THE WITNESS: No, it wasn't, your Honor. We had another album by Mr. Lennon.

THE COURT: You have what?

THE WITNESS: We had another new album which Mr. Lennon had recorded prior to the Rock 'n' Roll album.

THE COURT: What was that?

THE WITNESS: It was an album called Mind Games, or Walls and Bridges.

THE COURT: Walls and Bridges?

THE WITNESS: And Mind Games, both of which we did not feel -- let's just take the two albums prior to Rock 'n' Roll, which were Mind Games and Walls and Bridges.

Now, when we put out an album by an artist of Mr. Lennon's caliber, the exploitation of the album has a phase of time before it can have a sufficient degree of public acceptance, if you like, and it would have been most unreasonable and certainly from a marketing point of view entirely wrong for us to have put out anywhere around the end of October the Rock 'n' Roll album --

THE COURT: Let me just interrupt you.

In the decision I issued I said that the Walls and Bridges album was released in September '74. I hope that is correct.

MR. PRETTYMAN: I hope so, too.

MR. BERGEN: Yes, it is.

THE COURT: I guess that was stipulated. So Walls and Bridges, September 1974, right? Now this Mind Games, where did that come along?

THE WITNESS: That had been several months prior.

THE COURT: When was Mind Games, approximately?

THE WITNESS: I can't recall the date, your Honor, but --

MR. BERGEN: Your Honor, if I may, I believe Mind Games was around the end of 1973 when that was released, because Mr. Lennon I think testified that when he finished Mind Games, the recording sessions, and working on the album, he then went in and started the Spector sessions in October of '73. I believe there is testimony about how he felt he had been in the studio for a year.

THE COURT: So you put out -- don't you give lead time? If Walls and Bridges comes out in September 1974, obviously, as you say, there is a time when that is being promoted, right?

THE WITNESS: Yes.

THE COURT: And do you have an idea of how long you would normally wait before putting out another Lennon album?

THE WITNESS: Yes. It would be most unlikely that another Lennon album would be put out in less than six months. The period could be longer, depending on what was happening to the album that was being promoted and exploited, particularly with respect to singles that are pulled out of albums, the idea being to get the maximum possible exposure with a sense of concentration on an album that has just been put out on the street and not overloading and diffusing the promotional support for an artist's product.

THE COURT: So depending on the success of one album -- let me put it this way; the more successful one album is, the longer you wait, is that a kind of general rule?

THE WITNESS: Yes. In Mr. Lennon's case, for instance, it would be most unusual to put out more than, at the very most, two albums a year to start with.

THE COURT: Well now, did you have anything in mind as far as when you intended to start marketing the Rock 'n' Roll album, or wasn't it even thought about?

THE WITNESS: I think our expectation was that we would have put that album out, we would have thought of putting it out somewhere in the late spring of the following year of '75.

THE COURT: This was what the thinking was in

the fall of 1974.

THE COURT: '74.

THE COURT: Late spring of '75?

THE WITNESS: '75.

THE COURT: Was there any importance given by you to the fact that this was an album of old songs? Did that have anything to do with the timing, whether people would still be interested in Rock 'n' Roll or not?

THE WITNESS: No, sir. We knew that the album had been, production of the album had commenced in the prior year, around 1973. We were fully seized of the fact that it was of old compositions, of oldies. The fact that Mr. Lennon was recording them new gave them a special importance. We believe there was a significant market for the album. The question of when we were going to release it, however, was very much dependent on the albums that were released subsequent to his commencing the production of the oldies album, the last of which being Walls and Bridges.

THE COURT: Okay. Let us suppose that you were thinking in terms of late Spring release, a late Spring 1975 release, okay?

THE WITNESS: Yes.

THE COURT: Now, when would you start some work on that, whatever work you'd have to do?

THE WITNESS: It would vary depending on the type of work, sir.

The production of the album itself would probably have been undertaken, the physical manufacture of the masters and the matrixes to press the records and to duplicate the tapes would probably have been undertaken six to eight weeks in advance.

The difficulty of giving a discrete time factor is that it tends to vary depending upon the load on our plants at different times of the year.

THE COURT: It tends to vary depending on what?

THE WITNESS: On the loads, on the work loads that is going through a plant at different times of the year. You would wish to have a longer lead time if you were talking of October or November where the factories are generally extremely busy pressing products for the Christmas sale. It probably would have been in the region of a couple of months in the first six months of the year, based on average factory loads during that period.

There would have been different lead times, I'm not sure that I can be entirely specific, with relation to the production of the album jacket, lead times that --

THE COURT: When would you want to start the design and conception of the album jacket?

A I think discussions with Mr. Lennon obtaining his guidance and ideas on the matter would have probably started around January or early February, if we were aiming for a late March or an April release, because we would have wished to have naturally taken full account of his ideas and his wishes on the matter before sending it on for physical production in terms of --

THE COURT: So if you are heading for late March or early April you would start talking to Mr. Lennon when?

THE WITNESS: Around about the end of December or January or the beginning of February.

MR. PRETTYMAN: Your Honor, without in any suggesting that you restrict the questions, I do want to say for your help that Mr. Zimmerman who was directly in charge of marketing at the time will be the next witness so that he may be able to give you a little more specific answers on some of these questions.

THE COURT: Okay. That probably takes care of it.

Would the work on the album jacket, the work with Mr. Lennon, be the first thing you would start?

THE WITNESS: Yes, probably, because the lead time tends to be longer because printers tend to take rather long to deliver their jackets and fabricate them.

THE COURT: In this case, aside from Mr. Lennon's work on the music, the work of Capitol, is it correct, had not been started prior to the time you heard of this problem with Levy?

THE WITNESS: Yes, sir. That is true.

THE COURT: Okay.

BY MR. PRETTYMAN:

Q Well, Mr. Menon, when you use the word work, you are not suggesting that thought had not been given by --

A I am implying the manufacturing processes in the factory.

THE COURT: And the preparation of the jacket, the things you and I have been talking about in the last few minutes, none of that had been started before --

THE WITNESS: Sorry, that is not true, sir. The discussions had taken place with Mr. Lennon, towards the very end of January with regard to the packaging, with regard to the design for the album jacket.

THE COURT: Prior to the time you heard about a problem with Levy?

THE WITNESS: Yes, probably just prior. But very continguously; there weren't many days in it.

Q Even before that, internally, was Capitol giving thought to jacket design and problems of this sort?

A Very definitely. There was knowledge that the album had been recorded, Mr. Lennon had been working on it ever since 1973. A lot of people in our marketing and advertising divisions, in addition to the artists repertoire, people knew of the ongoing production of

this album and its forthcoming release, and thought had been, in varying degrees, given to the project.

Q So that when they arrived to meet with Mr. Lennon they had some sort of proposal, I take it?

A Yes, they did indeed, they had ideas, before they went up for those preliminary discussions in New York.

Q All right.

Now, Mr. Menon, turning just temporarily to a different subject, showing you what has previously been marked Plaintiffs' Exhibit 41-A through P, which is a series of telegrams that were sent by Capitol Records, most of them are the same, and may I just ask you, sir, to review that. You can review one of those as an example. Did you participate in the decision to send those telegrams?

A Yes, I did.

Q And did you approve the telegrams, the sending of the telegrams?

A The sending of it, yes.

Q Did you at the time that you made that decision and made that approval believe that Capitol and EMI had the rights that were asserted in those telegrams?

A Very definitely.

Q Now going back to this problem of the rushed

schedule, would you tell us whether Capitol was adversely affected in any way in your judgment by the necessity of rushing out the album quicker than you ordinarily would have done so?

A Yes, Capitol was --

Q Prejudiced in any way?

A The marketing support that could be devised and be implemented in support of the album was seriously prejudiced in my judgment.

The production of the album and its release I believe had to be undertake under the pressure of the Roots album in a period of something like seven days, which was extremely unusual.

THE COURT: What was done in seven days?

THE WITNESS: The physical manufacture --

THE COURT: I would be so much ahead if we could take it one step at a time instead of having these conclusory statements he was prejudiced because we had to do something in seven days. I don't know what they did in seven days.

MR. PRETTYMAN: I'm sorry, your Honor. I am trying not to lead him.

THE COURT: Just take it step by step and say what your company did; if you know.

A We obtained the final master tape from Mr. Lennon and undertook the --

THE COURT: When did you do that?

THE WITNESS: At the very end of January or the beginning of February, your Honor. I don't recall the exact date. It was in that period. And we had then to send -- we had to get physically manufactured the discs and the prerecorded tapes of that recording and also obtain from printers the album jacket. It was this process of obtaining these physical materials and having them manufactured and bringing them together that took -- that was done in the period of that week.

THE COURT: What was done in a week?

THE WITNESS: These activities that I just described, sir.

THE COURT: The actual manufacture of the records.

THE WITNESS: Yes, and of obtaining the jackets for packaging the records.

THE COURT: Done in a week?

THE WITNESS: Done in around a week to eight to nine days. I am not sure of the exact period.

MR. PRETTYMAN: May I assist the witness, your Honor, and show him Exhibit TTT, Defendant's Exhibit

TTT, which is an invoice which would indicate, Mr. Menon, that the final master was sent to Capitol on February 6, 1975.

Q Does that refresh your recollection?

A Yes.

THE COURT: That is in evidence?

MR. PRETTYMAN: Yes, it is.

THE COURT: February 6th. Okay, go ahead.

Q And I take it that it was, that the week that you are talking about, in effect, began to run from February 6th?

A That's right.

Q So that you had to do your actual manufacturing process in that period of time?

A Yes.

Q Mr. Menon, would you comment upon the stature in your judgment of Mr. Lennon as an artist, particularly as it relates to his value to Capitol and IMI and particularly as it relates to the amount of money, expense and time that has been spent in attempting to keep him as a major artist.

MR. KANZER: I object, your Honor. I am not at all clear as to what the point of this is.

MR. PRETTYMAN: The cases say that when you

are talking about damages, one of the elements that goes into it is the amount of time and expense that you have spent in building up and creating an artist.

For example, if Mr. Lennon had simply come with us a week before Mr. Levy talked to him, the damages would be much greater than the millions of dollars, literally millions of dollars that we have spent in creating and keeping him at the stature that he is at, and therefore we are doubly injured when they come to an artist of that caliber, in whom we have invested so much --

THE COURT: I can see your theory, but just ask the question in a way that brings out some facts and not just --

MR. PRETTYMAN: I asked him specifically related to the time,money and expense that had been devoted to keeping Mr. Lennon at the stature that he was at.

THE WITNESS: Mr. Lennon's eminence as a recording artist, as a musician, is probably without peer, your Honor. And I suggest both as a member of the Beatles as well as an individual artist in his own right, his importance is heightened by the fact that he is not only a performer of the highest accomplishment but also a writer of great significance to an entire generation of people

throughout the world. Mr. Lennon has been associated as a recording artist with EMI and Capitol since around 1962. As a member of the Beatles his performances and his compositions represented what is, I think, recognized to be incomparably the most important asset in the music business.

I'm not able to quantify what expenses have been incurred over these years in the development or the projection of the Beatles or of Mr. Lennon individually. It will be surprising if the figure were not considerable. But the time span we are talking about without a break in terms of his association with our group of companies is from 1962.

He has, in the last six or seven years, he has emerged with tremendous importance and impact as an individual performer outside the Beatles group, away from the Beatles group.

We have represented his performances on record, EMI and Capitol have, in that capacity as well, since about 1969, if you wish, that is the date that comes to mind.

His importance to us is without peer.

THE COURT: I want to adjourn for lunch.

MR. PRETTYMAN: I'm almost finished.

THE COURT: Why don't we finish.

MR. PRETTYMAN: Yes.

Q Mr. Menon, I show you what has been previously marked Plaintiffs' Exhibit 34, which is in evidence, and which is the Roots album.

Sir, would you describe for us what injury, if any, has been caused to Capitol, in your judgment, by the appearance and makeup of that album jacket?

A I think the mere existence of the album has brought great loss to Capitol and EMI through the impact that it has had on Mr. Lennon's image as one of the greatest superstars possibly ever in contemporary music.

The mere fact that a recording of new performances by an artist of the stature was purported to be offered to the public on television is something that has certainly never occurred and for good reason, for an artist of the stature, the physical package, itself, both the front of the cover as well as its back, in my opinion, and in the opinion of all of us in Capitol and EMI, represents almost the most extreme form of vulgarity and lack of taste.

It is truly, in comparison to the authorized recordings which Mr. Lennon has made and released to the public, and which he has at all times participated

with great care and diligence in the design of art for the covers, in comparison to that history, not only as an individual performer, but as a member of the Beatles group, this cover represents an almost all time low, it is almost a parody of what it is supposed to be.

The back of the cover, in addition, almost sells space to advertise recordings by other artists, something that I know of no parallel for an artist of Mr. Lennon's stature, at any rate, and I believe that it has has a seriously depressive image impact on the artist, the presentation of his works to the public, on the companies that have always been associated in the public's mind as being the purveyors of Mr. Lennon's recorded performances, which is ourselves and EMI, and I, to repeat, I believe the very existence of it and the fact that it was so offered through this particular means of marketing, has done him severe damage.

We are talking here about an artist whose records have, whose performances have never to the best of my knowledge been offered in any of what are described as a secondary market outside the full line retail market, secondary markets consisting of clubs, if you wish, or budget lines, or cheaper offerings for sale, something that has been protected with a great deal of, it has been

supported in a pristine manner, not only in terms of the quality of what was offered but also the manner in which it was at all times marketed.

Q I believe you testified to this, but I want to make sure.

Does EMI own the master of the Rock 'n' Roll album?

A Yes, EMI does.

Q And does EMI own the tapes that went into the makeup of that album, the tapes that are created out of which the final tape comes?

A It owns the copyright in the recordings themselves.

Q So that the point I'm trying to make is, the tape that was given to Mr. Levy is owned by EMI?

A The copyright is EMI's.

Q And does Capitol, through its contractual arrangements with EMI, have an interest in that copyright?

A Yes.

MR. PRETTYMAN: I hve no further questions.

THE COURT: All right, we will recess until -- it is now nearly 1:15, we will recess until 2:30.

(Luncheon recess until 2:30, p.m.)

AFTERNOON SESSION

2:45 p.m.

MR. PRETTYMAN: Your Honor, if you will indulge me in my usual fashion, I just have one or two questions left over as a result of lunch.

B H A S K A R M E N O N, resumed the stand and testified further as follows:

DIRECT EXAMINATION

BY MR. PRETTYMAN (Continued:)

Q Mr. Menon, you stated that the contract had concluded between Mr. Lennon and EMI and Capitol. Is Capitol still able to sell the Lennon albums which it has made while Mr. Lennon was under contract with you?

A Yes.

Q And does the conclusion of that contract diminish in any way Capitol or EMI's effort to promote and sell the Rock 'n' Roll album?

A Not at all.

Q Do you still have the right at any time in the future to compile albums from the Lennon albums which you now have, that is, to put out new albums that are compilations of pieces from old albums?

A Yes, we do.

MR. PRETTYMAN: That is all I have. Thank you.

THE COURT: Please read the question and answer.

(Record read.)

MR. PRETTYMAN: Just to pin that down, your Honor.

Q Mr. Menon, for example, could you take one or two songs from Rock 'n' Roll and a couple of songs from Walls And Bridges and a couple of songs from some other Lennon album and compile those and in 20 years or ten years or whatever put out an entirely new album?

A Yes, we could.

THE COURT: All right.

Cross examination.

MR. BERGEN: Before we start the cross examination, may we ask when we would be starting tomorrow morning?

THE COURT: I have in mind starting at 10:15. I have a little other business, but I think I could start at 10:15 and pretty much go the whole day.

MR. BERGEN: We have a problem. We are supposed to be before Judge Gellinoff tomorrow on the plaintiff's case in the State Court. We were before Judge Gellinoff about six weeks ago. We told him there was a decision pending at that time, and he said well come back to me on March 18th and let me know what happened.

And we are going to have to be over there or some of us will have to be over there.

THE COURT: I thought we planned to have these two days.

MR. BERGEN: Yes, we can, but I just wanted to find out when we were going to start.

THE COURT: Okay. Don't they start at 9:30 or so over there?

MR. BERGEN: I think they do.

THE COURT: Okay. Well, I think we have got a lot of work to do, so be back here at 10:15.

MR. BERGEN: Fine.

THE COURT: Okay.

CROSS EXAMINATION

BY MR. KANZER:

Q Mr. Menon, when did Capitol first learn that John Lennon was in the process of recording an album of old rock and roll selections?

THE COURT: Wait a minute, Mr. Kanzer, speak up, because I'm not hearing you.

Read that question.

(Record read.)

A Sometime in the latter part of 1973.

Q And subsequently did Capitol keep in touch

with Lennon as to the progress that he was making in that album?

A Yes, now and again.

Q When you say now and again, who would be the person who would be in touch with Lennon and was there a regular procedure for keeping in touch with Lennon?

A The person who would keep in touch with him on that particular matter would have been the vice-president of artists and repertoire, Mr. Al Coury. There is no formal procedure for it. There is a general manner in which people responsible for artists and repertoire keep in touch with the artists.

Q Does Mr. Coury report to you?

A Mr. Coury is not employed by Capitol at the present time, but at that time he did not report to me, he reported to Mr. Brown Meggs.

Q Was his procedure to report orally or in writing?

A I think it would vary depending on the where-abouts of the artist.

Q Do you know whether Mr. Coury or anyone else at Capitol had any discussions with Mr. Lennon in connection with his album of old Rock 'n' Roll songs between July and October of 1974?

A I believe Mr. Coury did.

Q Do you know what the substance of those discussions or contacts with Mr. Lennon were?

A I believe they initially consisted of --

THE COURT: The time period again we are talking about.

MR. KANZER: July to October of 1974.

THE COURT: Go ahead, Mr. Menon.

A I'm not entirely certain of the timeframe, but initially the discussions consisted of an attempt to try and recover the tapes that had been commenced in Los Angeles in '73 from Mr. Phil Spector who was a participant in those sessions, and Mr. Coury would have discussed the question of obtaining these back from Mr. Spector.

Q Well, by July or in July of 1974, had not Capitol already recovered those tapes?

THE COURT: He's apparently dating a subject -- he's describing a subject matter of discussion, and he said he's not sure of the time.

MR. KANZER: All I'm trying to do, your Honor, is to bring to the witness' attention that any such discussions would have been before the time period I'm asking about.

THE COURT: You know the time better than he does, maybe.

Do you recall that there were discussions at some time about getting the tapes back from Spector?

THE WITNESS: I do, sir.

THE COURT: Were those conversations between Coury and Lennon?

THE WITNESS: Yes.

THE COURT: And you do not know the exact months or month of those discussions, right?

THE WITNESS: No, I cannot recall.

THE COURT: All right.

Q Do you know whether there were any discussions between Mr. Lennon and anybody at Capitol after the tapes were recovered but before October 8, 1974?

A I cannot place it in terms of time.

Q Well, do you know whether subsequent to October 8 of 1974 and before December 31 of 1974 there were any discussions between Mr. Lennon and anybody at Capitol?

A Yes, there were discussions between Mr. Lennon and Mr. Coury.

Q And do you know what those discussions were about during that period of time?

A I believe there were discussions regarding the work that Mr. Lennon was doing on the tapes that he had obtained, the tapes which Mr. Spector had participated in, and I believe Mr. Coury called on him at the recording studio in New York where he was working on the tape.

Q Do you know whether Mr. Lennon during that period of time, gave any indication as to how far he had progressed in the recording of the album of Rock 'n' Roll selections?

A I do not know specifically.

Q Do you know when for the first time Capitol learned that Mr. Lennon had completed recording the album up to the stage of cutting a lacquer master?

A May I inquire whether you mean whether Mr. Lennon had cut a lacquer master or a tape --

Q No, the question was, when was the first time

that Capitol was aware that Lennon's recording efforts had progressed to the point where the only thing left was cutting a lacquer master?

MR. GRUMBACH: I think the question is misleading, your Honor, in light of the prior testimony that other things were done on the date immediately preceding the actual cutting.

THE COURT: Mr. Kanzer, your question may be too fine to be answered. I'm not trying to cut you off.

What basically are you trying to get at?

BY MR. KANZER:

Q If I can direct the witness' attention to Plaintiff's Exhibit 35, the Rock 'n' Roll album, and note for him that there are recording dates on the album, I'd like to know when for the first time Capitol was aware that John Lennon had gone into the Record Plant in October of 1974 and done recording work at the Record Plant?

A As I said, I think Mr. Coury was aware that Mr. Lennon was recording in the Record Plant in New York during October. I can't pin it to a finer date than that. I don't know -- I certainly have no knowledge of when he finished such recordings, as to bring them to a point where they were capable of being, with his approval, transferred on to an acetate disc.

Q Do you recall whether there was any meeting between Mr. Coury and Mr. Lennon in which the name Morris Levy came up prior to December 31, 1974?

A I believe Mr. Coury did mention to me that -- again I'm not sure of the time frame here -- but certainly prior to December 31st, that Mr. Lennon had made mention of Mr. Morris Levy.

Q When was the first time that you had any information that led you to believe that it was possible that any songs owned by any company connected with Morris Levy might be included in Mr. Lennon's album of rock and roll songs?

A I believe --

THE COURT: Let me hear the question, Mr. Reporter.

(Record read.)

THE COURT: Can you answer that?

THE WITNESS: Not precisely, your Honor. Sometime in the fall, late fall of 1974, I think.

MR. PRETTYMAN: May I inquire what the relevance of this is? I haven't objected up to now but it sounds almost more like his counterclaims than mine.

MR. KANZER: Well, I think, your Honor, that the Capitol attorneys and Capitol have taken the position that they suddenly learned in late January of February of 1975

that there was a possibility there was going to be another album coming out, that they suddenly began rushing, and I'm laying the foundation.

THE COURT: Mr. Kanzer, look, I agree that you can inquire on that subject. The only problem I have is that that this last question again was such a fine point, that I'm not sure that Mr. Mennon understood it. I'm not completely sure I understand it.

MR. KANZER: I think Mr. Menon did because he did answer it.

THE COURT: Was there a time when you heard that some songs of Morris Levy were going to be included in the Rock 'n' Roll album? Do you know what I'm talking about?

THE WITNESS: Yes, I do. I believe I place it around the fall of 1973.

THE COURT: The fall of 1973?

THE WITNESS: 1974. Excuse me.

THE COURT: What was the occasion of your learning about such a thing?

THE WITNESS: I think my recollection is that Mr. Alan Klein informed me that Mr. Lennon was considering recording some songs which were owned by one of Morris Levy's publishing outfits.

THE COURT: Okay. Fine.

Go ahead, Mr. Kanzer.

BY MR. KANZER:

Q Did Lennon give Capitol any indication when he expected the album thathe was working on to be completed?

A Not that I know of specifically.

Q When did Lennon first deliver any tapes to Capitol of his performance?

A I gather that he had given a tape for purely auditioning purposes, a rough mix of a seven and a half inch tape, to Mr. Coury some time at the end of 1974. The only other occasion that I have any knowledge of was in the first week of February, 1975, when we -- I am not sure whether we obtained a tape or a cut disc of the record for production purposes.

At the time we were undertaking the manufacture of the record.

Q When did Capitol start planning the release of the Rock 'n' Roll album?

A Started planning the release?

Q Yes.

A Well, effectively, Capitol's normal planning processes as such for its releases with respect to the Rock 'n' Roll album were somewhat pre-empted by the discovery

that the Roots album was about to be offered to the public. That was around the end of January, 1975, or the beginning of February. To that extent, the release date or the activities that are concerned with making the physical record available for delivering it to the market place was undertaken about the 6th or 7th of February for the following week or ten days.

Q I think you misunderstood my question, Mr. Menon. I am not restricting my question to the fine point of when the plans were made to physically manufacture the album. I am asking when did you begin -- by "you" I mean Capitol -- begin planning the promotion, the advertising, the marketing campaign for the Rock 'n' Roll album?

A As far as we were aware of the progress that was being made on the album for some months during the fall, say, of 1974, I would think that thought was being given by various people to the sort of advertising and promotion and merchandising that would be devised to support the release of the album as and when it was finished and as and when we decided, in light of the album we were at that time promoting and selling, the new release Walls and Bridges, as and when to set the release date.

As I believe I testified today, it would have been very unusual for us to have considered a release date

as such earlier than six months after the release of Walls and Bridges, and to that extent thought was being devoted to what we would do when Rock 'n' Roll would be released on the market would have been of a general nature and it may have commenced some time -- I am not really sure what time various people started giving preliminary thought to it. It could have been in November or December and certainly in January of '74, '75, none of which, of course, was specific, which it could not be until the product was delivered and listened to and the package, which constitutes an important central part of merchandising campaigns around the record, until these matters were finalized.

THE COURT: I am not sure, what was the last part of the answer.

(Record read.)

THE COURT: I don't know what you meant in the last part of the answer.

He asked you when work or thought started, and I guess you said it was sometime in November, December or January, although it was general and preliminary, right?

THE WITNESS: Yes.

THE COURT: What did you mean in the last part of your answer? I didn't understand.

THE WITNESS: I think it is a matter of the

degree of specificity which conceptual thinking with relation to advertising, promotion and so on, translates itself into devising specific promotional measures, and the reason for that -- the reason why that transition from a general concept to specific measures, I can illustrate some of them, your Honor, the reason that can only follow people being exposed to the recording itself and particularly to the art that is going to be used on the package of the album is because the design of the album jacket is generally the center of the whole syntax of the campaign that is built around for the support of the album.

For instance, you might, in knowing sometime in December or in November that a Rock 'n' Roll album was under production, you might in general conclude that you would support the sale with a television spot, you would conclude that you would undertake press advertising, do various other things, talk to people in the consumer press, Mr. Lennon may give interviews. These are general areas of support to a record product which would be appropriate when you know the general concept that the artist is projecting in this album.

THE COURT: What does it ake to know the general concept? Do you have to have the music or what do you have to know?

THE WITNESS: In terms of each of those examples that I mentioned, until we had this jacket you would tend not to devise the television film.

THE COURT: You are saying the jacket design is a kind of one basic thing before doing anything else?

THE WITNESS: Right. In a number of other areas such as, for instance, with the consumer press, making radio spots, you would wish to use -- you would wish to have heard and in case of radio spots perhaps use excerpts from the recorded album.

So at that point you are devising a specific campaign and you are translating a general intention into specific measures, making films, making radio spots, going to the press and so on.

It is that transition I was attempting to explain.

Q What concret things other than just thinking about the promotion had Capital done by January 29, 1975?

A The only one that I have any recollection of, Mr. Kanzer, is a meeting which three or four people from our company had with Mr. Lennon in New York in

the course of which they discussed the concept of the album jacket design.

Q Did they go beyond just discussing the concept of the design or did they agree upon a design that night?

A I believe they may have agreed upon the concept. I am not sure they had the artwork in any state which could have been approved.

Q May I read to you a passage from a deposition of Al Coury in this action and see whether it refreshes your recollection.

This is from page 70, line 4, your Honor.

"We presented from the album cover concept right through the different media advertising type concepts. John made some suggestions. He had a suggestion in relation to the album cover. We had -- he thought it would be a good idea if we contacted this particular German photographer who he knew who was not closely involved but involved with the Beatles in the early days of the Beatles. He took pictures of the Beatles before anybody knew who the Beatles were at the early stages of their development as a group, that he had photos that we might be able to purchase.

" As a matter of fact, he gave us the telephone number. May Pang called this gentleman up whose name was

Jurgen Vollner. He was a German photographer who took pictures of the Beatles in their early stages and he would sell them to people in the street, a package of 25 photos for $10.

" He owned all the rights to them. He owned the rights to them. He had the photos that John thought we would consider for the album cover. This was the photo --

"MR. PRETTYMAN: You are referring to the back jacket of Plaintiffs' Exhibit 7?

"A (Continuing) This is the front jacket. We bought this photo that night. We called him up, the photographer."

MR. PRETTYMAN: I object to this whole line here. May I point out to you, number one, we had extensive testimony from Mr. Lennon about this meeting. Mr. Lennon was at the meeting. Mr. Menon was not at the meeting. He hasn't even said it was reported to him in great detail. Now we are reading from the deposition of somebody who hasn't been a witness, there is something contradictory with what has been read with what Mr. Menon has said.

THE COURT: I don't know that there is any issue. I had always understood that there was a specific jacket design brought to that meeting by the people at

Capitol and I think Mr. Lennon had his idea and they revolved basically on what to do.

Unless you have something to the contrary to suggest, that is really pretty much in the record.

MR. KANZER: Your Honor, I think there are two things.

One, this morning Mr. Menon made the suggestion that Capitol was rushing this album out, and I am trying to isolate what was actually rushed.

THE COURT: You have every right to do that and it may be difficult to recall exactly what is in the record. We have been trying this case over a long period of time. I don't think there is any controversy. My memory of the facts is what I said a minute ago.

Is your contention any different?

MR.KANZER: My connection is that this went somewhat beyond where I think your Honor was indicating.

THE COURT: I would be happy to know where they went beyond. Mr. Menon can testify about it. What is there --

MR. KANZER: Perhaps I could simply read a passage from defendant's state of uncontested facts at this point. I think that might clarify it somewhat.

THE COURT: All right.

MR. KANZER: This is from paragraph 94.

"Final plans were presented to and approved by Lennon for the entire advertising, promotion, and merchandising of the Rock 'n' Roll album."

This is referring to the January 28th meeting.

"At Lennon's suggestion, a German photographer Jurgen Vollner, was called and his permission was obtained for the use of on the album cover of an old photograph Vollner" --

THE COURT: This is whose statement of facts?

MR. KANZER: Defendant's statement of facts -- "had taken of Lennon. There was an extensive marketing campaign discussion including various media that would be used. Kileen ran down a complete marketing campaign in the others' presence and Lennon approved it with some minor corrections."

THE COURT: All right, I have.

Q Could you tell us what Capitol did in connection with the promotion of the Rock 'n' Roll album between Januarh 29th, which would be the day after that meeting we have just reviewed, and February 17th, which I believe was the date the album was actually released?

THE COURT: Was February 17th the release date? Is that right? Is that agreed?

MR. PRETTYMAN: No, February 17th?

MR. KANZER: I believe it was February 17th.

MR. BERGEN: The 15th, your Honor.

THE COURT: Shall we agree on February 15th as the release date?

Do you know?

THE WITNESS: I don't know for sure.

THE COURT: Does somebody in your organization know?

THE WITNESS: Yes, it is verifiable.

MR. KANZER: Apparently the statement of uncontested facts of the defendant in paragraph 125 says, upon this same date, February 7th, the Rock 'n' Roll album was released. I don't know whether that was an error on your part.

MR. PRETTYMAN: I think that is an error, because that was the Roots album.

THE COURT: Roots album was released February 7th.

MR. KANZER: I wondered whether that was a correct reference.

THE COURT: That is information Mr. Menon or Mr. Prettyman can get. It was about the middle of February, right?

MR. KANZER: All right.

Q Using either February 15th or February 17th as your date, whichever you prefer, could you tell us what was done during the period between January 29th and that date with reference to the release and promotion of the Rock 'n' Roll album?

A I don't think I can in any detail, because the activity, specific activity with relation to implementing promotional and merchandising schemes in connection with this album I didn't know of, but certainly a single from the album would have been chosen, put out in the market-place.

THE COURT: Are people going to testify about the details of that, about the actual details of what went on during this time when they were getting --

MR. PRETTYMAN: Yes, the head of our marketing department at that time is going to testify.

THE COURT: Can you defer that?

MR. KANZER: I think since the witness has made the statement that and testified in some detail this morning, your Honor, that they were unable to do their normal marketing campaign or had to speed it up unusually, I think I'm entitled to ask it of this witness.

THE COURT: You are certainly entitled to get it but he indicated really in response to a number of questions this morning that he has only the most general knowledge and not a detailed knowledge of what went on, and I think we are kind of wasting time to ask him a lot of production details. That isn't his business.

MR. KANZER: What troubles me, your Honor, is that he did not make that qualification, I believe, when he testified this morning. I believe this morning he was presenting the evidence as thought he was stating it of his own knowledge, and now I seem to find that --

THE COURT: His testimony was in very general terms. That is normally, you would take much more than one week or two weeks to do what was done in two weeks here. And that is really about it. And he testified as to the reasons. He was testifying as to general policy.

I want to ask you really, Mr. Menon, at the same time as this thing was going into production,

Capitol was sending out telegrams trying to stop the Levy album, right?

THE WITNESS: Yes.

THE COURT: Now refresh my memory. When were the telegrams sent out?

MR. KANZER: Approximately February 7th, your Honor.

THE COURT: February 7th?

MR. PRETTYMAN: There is a series of dates on them, your Honor.

MR. BERGEN: I think they started on the 7th. I think Mr. Lennon's telegram was sent on the 10th of February, which was a Monday.

MR. PRETTYMAN: Followup telegrams were sent the next few days --

THE COURT: When did the telegrams start?

MR. BERGEN: The 7th, which was a Friday, your Honor.

THE COURT: Did your company receive any kind of information as to the results of those telegrams?

THE WITNESS: I believe we had a response from Levy, for instance. I think we sent them, my best recollection is that we sent them to three or four different groups or kinds of people. We sent them to people, to

the television stations, to people who were manufacturing the record for Mr. Levy --

THE COURT: Well, what I have in mind is this, and I can't recall this in detail, but my memory of the evidence is that the telegrams were indeed affected, and that within a very short time the wheels were halted on the Levy album, and I am just asking you if you got any information of that nature or any different information about what was happening.

Was the Levy album proceeding at full blast and selling thousands upon thousands, or did you inform yourself as to, you know, what the situation was?

THE WITNESS: Well, I think we were, the main thing we were taking a look at was whether or not the advertisements would run in all the television stations to whom we had sent telegrams, and we were naturally most anxious on this point because as soon as the ads ran on the stations, the availability of the record was being announced to the public, to the ultimate consumer, and the only feedback that I can recollect that we obtained in the few days after the 7th of February, when the telegrams started getting sent, was that some of the stations were in fact carrying the advertising.

THE COURT: Some means what?

THE WITNESS: I can't exactly recall the proportion of stations that were reported to us as having carried the advertising as against those that didn't, your Honor, but my impression is that a sufficient number were reported as having carried it to have caused us concern.

THE COURT: Well, how long did they carry it?

MR. PRETTYMAN: Your Honor, if it would help you, on Plaintiffs' Exhibit 41-A to P, the first telegram that is shown here is February 7th, and I believe the last one that I see here is February 13th.

Now, the one to Ivy Hill could possibly have been sent before the 7th, a day or two before, but the 7th is the earliest date I have in here.

THE COURT: How long did the TV advertising keep on?

MR. BERGEN: Your Honor, this morning we served on the plaintiffs and I believe we hand delivered to your chambers two memos. The one that is entitled a reply memorandum on behalf of John Lennon has attached to it a two-page schedule which we marked as Exhibit A, which was produced to us by the plaintiffs, and purports to list the television stations on which the advertisements ran and the dates on which they ran.

THE COURT: What does that show?

MR. BERGEN: It shows it ran in I don't know how many cities, but probably, maybe 15 cities all around the country and it ran from as few as two days in some cities to six days in others.

The third column from the right, which is headed "Column 4," I believe Mr. Levy testified is the revised scheduled dates when the commercials actually ran.

THE COURT: This would show that the last date was February 16th.

MR. BERGEN: That is correct, your Honor.

THE COURT: What I'm getting at, Mr. Menon, is, I don't have all this in mind, and I don't suppose I have received all the evidence, but I have in mind that in general that the campaign of Mr. Levy and the distribution of his record was cut off a lot shorter than it would have been without these telegrams, is that not your impression?

THE WITNESS: Probably so.

THE COURT: And I'm just trying to find out what you found out about it at the time. Di dyou think that this was going on week after week after week or did you think that it had halted or didn't you find out?

THE WITNESS: Well, between -- in this parti-

cular timeframe, as to what we thought between say the 7th when we put the record out around the 15th or the 17th, in sending the telegrams it was our hope that we would prevent the spots from appearing in any of the stations. We certainly got to know in a couple of days that that object was not being accomplished because it was being reported back to us that some of the stations were running it.

I cannot recall what proportion of the stations we sent telegrams to actually ran them, but there were a sufficient number of them that appeared to be carrying the ad, despite our presumption that they had received our telegrams, and this went on for, well, during that particular period of time, the 7th, I believe the 7th and the 15th to a sufficient degree to cause us concern.

THE COURT: Was any consideration given to -- let me start over. Your argument is that you were forced in some way to rush the Rock 'n' Roll album and do less than you would normally do?

THE WITNESS: Yes.

THE COURT: In preparing that album and so forth, right?

THE WITNESS: Yes.

THE COURT: Was any consideration given to going to court and applying to stop the Rock 'n' Roll album -- no, I'm sorry -- was any consideration given to going to court and halting the production and advertising of the Roots album so that you could proceed with your Rock 'n' Roll album in the normal manner and with the normal care and support and so forth?

What about that?

THE WITNESS: I believe our attorneys did consider moving a court for an unjunction or to prevent the sale of the Roots album as one of the options that were probably open to us. I believe consideration was given to that.

THE COURT: Why wasn't that done so that you could then, you would not have to rush this album without the quality that you sought usually?

THE WITNESS: I really don't know, sir. I can only say that it was apparently concluded by our legal experts in consultation with our outside attorneys that this would not be the best or the most appropriate course to take, which was why we took the course of action which we did which was that of hopefully keeping various people, including Mr. Levy, forewarned of the violation of what we believed were our rights in this matter.

Q Was any consideration given to this -- I withdraw that.

THE COURT: Okay, go ahead.

BY MR. KANZER:

Q Was any consideration given to contacting Mr. Levy in advance of the release of the Roots album or in advance of the release of your own album to find out whether he truly was planning to put out his album, and if so, to put him on notice that you claimed he had no right to do so?

THE COURT: He was put on notice, Mr. Kanzer. Wasn't there a telegram sent to him?

MR. KANZER: The telegram was sent on February 7th, received on February 10th, and the album was released on February 7th, your Honor.

Q I'm wondering whether between January 29th, Mr. Menon, when I believe the testimony of Mr. Seider has been that he was notified by Levy of Levy's intentions, whether between that date and February 7th there was any attempt made whatsoever to contact Mr. Levy?

MR. PRETTYMAN: Your Honor, I object to the inference of the question because both Mr. Levy and Mr. Seider have testified that the meeting, when they finally met, they were in substantial agreement on what was said, and that was Levy said I'm going ahead, I don't care, I'm going ahead.

THE COURT: The only thing I wondered, why didn't somebody from Capitol go to see Levy? It was Capitol's rights, and that meeting, where the statements were made, it was Mr. Seider who went, and I think maybe there is something to that question. When was it that Capitol or any representative of Capitol went to Levy or communicated with Levy to the effect that Capitol insisted on a maintenance of its rights? Do you understand my question?

THE WITNESS: I do.

MR. PRETTYMAN: Your Honor --

THE COURT: No, let him answer the question.

THE WITNESS: I believe the first formal communication with him would have been in the form of the telegram we sent him, your Honor.

THE COURT: I'm not talking about formal. Maybe I missed something. Were there any discussions or informal communications?

THE WITNESS: I should have said direct communications rather than formal. The first direct one from Capitol would have been the telegram.

THE COURT: Were there indirect ones in your view?

THE WITNESS: I couldn't say, your Honor. I did receive in that month of January, it was the end of January, rather strange telephone calls from a third party who represent himself as conveying messages to me regarding Mr. Levy's intentions, supposedly at the beheist of Mr. Levy.

If I may respectfully say so, if that were in fact so, if he were in fact acting at Mr. Levy's beheist in this matter, I think by any standards, the choice of the third party would have been regarded as being extraordinary. It is inappropriate for this particular circumstance --

THE COURT: I don't understand.

THE WITNESS: Well, Mr. Klein had informed me that Mr. Levy had informed him that he was intending to release this album Roots on television. My reaction to what Mr. Klein told me was frankly one of disbelief. I didn't necessarily, really I could not see his standing in this matter at all.

I think it would have been strange for me to have ever believed that if it were Mr. Levy's intention to

keep Capitol informed of his proposed course of action, that he could hardly have chosen a more inappropriate intermediary than Mr. Klein because it was fairly well known, in fact it is widely known that Mr. Klein has an adversary relationship in terms of lawsuits, with Apple, with the Beatles, with Mr. Lennon, personally.

He has had his relationship with my own company, where there were continuing aggravations arising out of attachments that he has made of royalties that are due from us to the Beatles and so on. He's a person who is widely recognized as having a position of ostensible conflict, both with Mr. Lennon and his interests as well as with Capitol.

I therefore didn't take very particularly serious note of Mr. Klein's expression of what he had heard from Mr. Levy, and in fact, I believe I did tell Klein that I just thought that this is impossible, because Mr. Levy ought to know, as in fact everyone did, that EMI and Capitol owned the rights to Beatle recordings.

Besides that, I cannot recall any form of indirect communication with Mr. Levy. I'm now assuming that Mr. Klein conveyed what I said to him to Mr. Levy.

MR. PRETTYMAN: Your Honor, may I with very great respect, object to the tenor of your law questions because I think we are here today because somebody tried to

sit down orally with Mr. Levy to work something out and I know that if I had been consulted by Capitol at this particular stage the last thing I would have let anybody do was to go over and sit down with Mr. Levy and try to work this thing out and I think that there is an assumption in your question that that is a reasonable procedure, and I just want to say with great respect that --

THE COURT: I'm not suggesting they go sit down. Maybe a letter.

MR. PRETTYMAN: Well, they sent a telegram.

THE COURT: February 7; the release date. Why didn't Capitol address some communication to Levy before February 7?

MR. PRETTYMAN: Your Honor, if you will recall the testimony of Mr. Levy, he was himself rushing at this point to get it out in record time, as soon as he found out that he didn't have the rights.

I don't think there is any reason why we should have assumed that he was going to get this thing out as quickly as he did.

THE COURT: No, but I am being told Capitol is entitled to damages because they had to rush the album.

Now, if you look at the chronology there wasn't all that much rush. Capitol must have known -- and I don't

think this has been explored, but if somebody wants a bunch of hundred thousand dollars or having to rush an album, I think everybody is entitled to go into this quite closely, and I don't understand and never have understood why a few things were not done that would have made ordinary common sense, that is, like responses to Levy's January 9th letter.

MR. PRETTYMAN: That wasn't us, your Honor. Don't confuse it.

THE COURT: Did you know, did you have any inkling of a Levy letter of January 9th?

THE WITNESS: Addressed to us, sir?

THE COURT: Addressed to --

MR. PRETTYMAN: That was not our -- we were not connected with that in any way.

THE COURT: I don't know, I just wondered, didn't Capitol know about that?

THE WITNESS: At that time, no.

THE COURT: When did you first learn?

THE WITNESS: I, personally, probably a couple of months ago.

MR. PRETTYMAN: Your Honor, may I point out to you --

THE COURT: To me, the one feature that has always bothered me is, and I think it is the fact that

Capitol was not informed of more than it was informed.

MR. PRETTYMAN: All right.

THE COURT: Now that really is not entirely Mr. Levy's fault.

MR. PRETTYMAN: No, but it is not our fault either.

THE COURT: And so in addition to that question, I would like to know what Capitol did know, and the dates are very important.

In other words, if Capitol had reason to believe in early January that Levy had this intention, one might have thought they might have either filed a suit or addressed a suit or done something.

MR. PRETTYMAN: I'm not trying to stop that, your Honor.

You can go into that as much as you want. All I want to point out to you is if you are implying that we should have done something more than we did between January 30, when the word definitely came down and he made his decision, and February 7, when we sent the telegram, may I say to you, sir, that it seems to me that we would have been very derelict in our duty in rushing out to do anything until we had established what the facts were, and if you will recall, there were meetings, several meetings in

that time, when we were attempting to establish from Mr. Seider and Mr. Lennon precisely what had gone on and what had been said, and the extent of what they had done, and so forth.

Also, there had to be consultations between attorneys, both here in the East and in the West, in regard to what appropriate steps should be taken, and I think that too imply that the minute you hear this that you suddenly, you know, rush out and do something precipitous and file a lawsuit and so forth, would not have been proper.

MR. BERGEN: The other thing, your Honor, is, I don't think anybody learned that Mr. Levy was going to actually release the album until we found out, I believe either late on February 6 or early on February 7, that we heard from some source that ads were going, television ads were going to appear that weekend, and it wasn't until then that I think everybody realized that this thing is not only going to happen, it is about to happen, you know, at any moment.

THE COURT: Let me ask you this: The evidence that I had on the earlier trial was that on January 9th, you had a luncheon meeting with Seider at the Brown Derby in Los Angeles. Was it you or --

THE WITNESS: I don't believe it was me. It

was Mr. Al Coury.

THE COURT: Mr. Coury. What was the occasion for that meeting, do you know?

THE WITNESS: No, not except that Mr. Seider represents Mr. Lennon's interests; and I assume that conversations took place on the Walls and Bridges album and the performance of the album thus far, and I don't know if there were any other specific purpose.

THE COURT: Well, the date is coincidence, Mr. Menon, because January 9th happens to be the date of a letter from Mr. Levy to Mr. Lennon's attorney announcing that Levy believes he has the rights to market his album throughout the world and so forth.

I was led to believe at the earlier trial that at some point Capitol, Coury or somebody, called Seider and said, we want to see you, and that led to the Brown Derby luncheon on January 9th at which Seider, for the first time, really explained his dealings with Levy.

Now, all these lawyers are rising -- if they would sit down, I'd like to just question the witness.

Now, I would like to know if that refreshes your memory about the circumstances of that luncheon at the Brown Derby.

THE WITNESS: The dates are terribly important,

Honor, but this is a while ago. I have really no clear recollection of the circumstances under which the January 9th luncheon between Mr. Seider and Mr. Coury took place, what brought it about.

I think I was aware after that luncheon had taken place that in fact it had taken place, and --

4A THE COURT: Did you get a report from Mr. Coury of that luncheon?

THE WITNESS: I believe I did.

THE COURT: What did he tell you happened at that luncheon?

THE WITNESS: I am not really entirely sure. There were so many events between the 9th and the end of that month. The chronology I am not certain of. I believe Coury may have told me about the interests that Mr. Seider had told him Morris Levy had expressed an interest in the television package. That is the point you were asking about. He may have also mentioned subjects relating to Capitol's performance in the marketplace of Mr. Lennon's Walls and Bridges album and various other matters of that nature. I really have no clear recollection of what he said to me.

THE COURT: When was the first time that you heard that Mr. Levy was asserting his rights to put out an

album of his own or something like that?

THE WITNESS: I think the first time I heard of his intention to put out the album or that he had expressed an intention of doing so was around the middle of January, to the best of my recollection, and I really heard this from the conversations Alan Klein had with me which I spoke about a little earlier.

That's my best recollection of where I came to know of his intention of putting out this album.

THE COURT: Have you now seen that letter of January 9th? I know it is in the courtroom. Have you seen that now in the course of this litigation?

THE WITNESS: I believe so.

THE COURT: We will take a short recess and maybe the lawyers can get that exhibit out. I will ask you about that when we resume.

(Recess.)

MR. PRETTYMAN: Your Honor, over the recess Mr. Menon has said that he was partly confused in terms of the difference between the actual intent to put something out as opposed to an expressed interest to put something out and he would like, with your permission, to state what the facts are.

THE COURT: Sure.

THE WITNESS: During the month of January, '75, around the middle of January I was informed that Mr. Levy had expressed an interest in marketing the Lennon album on television through one of his companies. This was information with regard to an expression of interest on his part to do so.

THE COURT: Who informed you of that?

THE WITNESS: I believe Mr. Seider and Mr. Coury, who had presumably learned from Mr. Seider.

THE COURT: Did Mr. Seider meet with you following the Brown Derby luncheon with Coury?

THE WITNESS: Yes, immediately during the middle of January of '75.

THE COURT: By middle you mean what?

THE WITNESS: 14th or 15th of the month.

THE COURT: Can I have that January 9th letter?

MR. PRETTYMAN: Yes.

Do you want him to complete this first?

THE COURT: I am sorry. I thought maybe you had.

THE WITNESS: Information with regard to Mr. Levy's intention to proceed with this plan, of actually doing so as distinguished from his expression of interest in such, came to me at the very end of that month, and that

was through Alan Klein, which was the conversation where he was supposedly conveying to me what Levy had conveyed to him.

At that point, and that is at the end of January, 1975, it was at that point for the first time that I had heard anyone suggest that Levy had expressed an intention of actually putting this thing on television and going ahead with the project which earlier I had understood he had expressed an interest in.

That is the chronology within the month of January.

(Continued on next page.)

THE COURT: Let me see the letter.

You have had a chance to look at this.

MR. PRETTYMAN: I showed it to him.

THE COURT: I guess you know my next question, and that is during the month of January or during the time we are talking about, this general time period, were you ever given a copy of this letter of January 9th from Levy to Dolgenos?

THE WITNESS: No, I was not.

THE COURT: Were you ever during this time -- and let's include in this time the January - February timeframe -- do you understand?

THE WITNESS: I do.

THE COURT: During that January - February timeframe you were not given a copy of the letter?

THE WITNESS: No, I was not.

THE COURT: During the same two months or so, were you informed of the substance of this letter in any way?

THE WITNESS: No, I was not.

Q You say that you met with Mr. Seider on the 14th or 15th of January?

A Yes.

THE COURT: Are you telling me that he did not

tell you of any claim by Levy of the right to put out an album of Lennon's rock and roll songs?

THE WITNESS: No, he did not.

THE COURT: Did he at any time in the days or week or two thereafter?

THE WITNESS: No. What he did say was a bit earlier he informed me Mr. Levy had expressed an interest, and, indeed, he did tell me he had pointed out to Mr. Levy the required permission from EMI and Capitol. It was in that context he spoke to me on the subject of Mr. Levy and his interest.

THE COURT: You said that towards the end of January you had these talks with Alan Klein that you have described, right?

THE WITNESS: Yes.

THE COURT: The record in the earlier trial showed that there was a meeting on January 29th or January 30th between Seider and Levy in New York where Levy made an announcement that he would proceed with the album.

I take it you were informed of that meeting after it occurred, were you not?

THE WITNESS: I was informed that the meeting was going to take place, because Seider had told us he was intending to call on Mr. Levy; I was informed that

purpose was for Mr. Seider to inform Mr. Levy that he could not go through with this television package in which he had apparently expressed an interest, and I knew that such a meeting had taken place.

THE COURT: But were you told, when you learned that the meeting had taken place, were you told that Levy had announced he would go through with the album?

THE WITNESS: I don't believe so.

THE COURT: Are you telling me that the information you had about Levy going through with the album, the information at the end of January, was solely through Alan Klein?

THE WITNESS: Yes. That is when I recall having first heard of Levy's intention to go ahead with the project.

THE COURT: Well now, you told us this morning that there did come a time when you decided on a kind of crash schedule to get your own album out, and I am not trying to pin it to a particular date, but in the chronology of events that we have just been describing, when did that occur, and what was it that brought that about?

THE WITNESS: That occurred somewhere around the 6th or the 7th of February, 1975, and what brought it about was information which we received directly, our advertising department or someone in our marketing division received from either an advertising agent or someone who engages in buying time on television for us as well as other people, and the information that was received was that Mr. Levy had commissioned the purchase of television time for the advertising of his Roots album, and that would have been somewhere about that date, around the 5th, 6th, 7th.

THE COURT: When Mr. Klein gave you whatever information he gave you, did you then consult with your attorneys?

THE WITNESS: I don't know if I consulted with them, sir, but I believe I may have mentioned it to them.

THE COURT: Did you consider taking any steps at that time such as writing Mr. Levy about Capitol's rights or telegraphing him or suing or any steps at all, when you first heard these words, this information from Alan Klein?

THE WITNESS: No, I don't think so, sir. I don't believe that Mr. Klein's passing of that information to me had sufficient credibility in it for us to have presumed Mr. Levy's intention in this regard.

THE COURT: Okay. I have no further questions at this time.

Mr. Kanzer, you go ahead.

MR. PRETTYMAN: Your Honor,was your last question directed toward the information in mid-January about an interest or was it related to the intention?

THE COURT: I specifically said the Klein information.

MR. PRETTYMAN: So it was related to his intent, and you are asking him whether he consulted with his attorneys after he found out that --

THE COURT: What do you mean related to his intent?

MR. PRETTYMAN: Levy's intent on January 30th to put out the album.

THE COURT: I think the question is perfectly plain. Did you understand my question?

THE WITNESS: I thought so.

THE COURT: Yes, about what happened after the Klein information.

MR. PRETTYMAN: But the Klein information was that Levy intended to put the album out.

THE COURT: I think we all understand.

MR. PRETTYMAN: Except that he said he did meet with his attorneys previously. That is why I thought he might have misunderstood the question. I thought he certainly met immediately --

THE COURT: What are you trying to do; are you trying to testify now or what?

MR. PRETTYMAN: I'm sorry. The question was confusing to me and in view of his answer I thought it might have been confusing to the witness.

THE COURT: The thing is up until the last ten minutes I did not have the chronology of what had happened with respect to him leaning about these different things. Nobody brought it out. And frankly, it is somewhat of a surprise to me. I was assuming a little more information to Capitol, a little earlier.

MR. PRETTYMAN: Your Honor, the information

we had had before we got here. I didn't think we were here to put that all back in again. We had detailed information from Mr. Seider and Mr. Klein about --

THE COURT: We didn't have detailed information about what we are talking about.

I don't want you confused, Mr. Menon, at all.

When was it -- again, I don't care about whether it is February 4th or February 4th and a half or what; I mean, in relation to the events we have talked about when was it that you first consulted or spoke to attorneys about the situation with Levy in any way?

THE WITNESS: My best recollection is that it was around the time when we had information from these advertising agents of his having both the television time. As I said, I'm almost certain I would have mentioned Klein's calls to my attorneys. I can't really recall --

THE COURT: What did you just say to me, you would have --

THE WITNESS: I may have, to our in-house counsel, I may have informed them that Klein called and said this.

THE COURT: What is your best memory, that you did or you didn't?

THE WITNESS: I really have no distinct

recollection.

THE COURT: Who is your in-house counsel?

THE WITNESS: Mr. Carp who is general counsel of the company.

THE COURT: Mr. Who?

THE WITNESS: C-a-r-p, Carp.

THE COURT: Okay.

MR. KANZER: Your Honor, if I may --

THE COURT: Just a moment.

So you may, at the time of the information from Klein, you may have informed Carp, but you are not sure?

THE WITNESS: Well, I think almost certainly I would have, but I haven't really got a vivid recollection of conv sation of the subject. But I think I would have.

THE COURT: After you received the information through the advertising channels about February 6th, then again what consultation, if any, did you have with attorneys? I know you have given me that, but just repeat that if you would.

THE WITNESS: Again, your Honor, I'm finding it extremely difficult to pinpoint dates here because we are talking against a time span of four or five days, really, about over a year and a half, hearly, ago,

but within that timeframe there were, I had consultations with my in-house attorneys on the-- we were extremely surprised, most amazed at that time at what appeared to be Mr. Levy's intention to market this record which we regarded as being our property.

Examinations were made by our attorneys of the contract, the documentation that was relevant to this issue. Outside counsel were consulted, I believe; if I remember again within that time span. And these were the processes of consultation that took place at that time.

THE COURT: Leading up to the telegrams that were sent, right?

THE WITNESS: Yes.

THE COURT: An exactly when you had the legal consultations you are not quite sure of?

THE WITNESS: I'm no able to pinpoint it at the present time.

THE COURT: I understand that. Okay. All right, Mr. Kanzer, back to you.

BY MR. KANZER:

Q Perhaps, Mr. Menon, perhaps we could help you pinpoint the dates better. If I may I'd like to read to you from your depositing starting at page 155, line 21:

"Q Did you have any subsequent discussions with Mr. Seider in connection with Mr. Levy and the Lennon album?

"A I believe I did.

"Q Could you tell us when?

"A Around the last week of January.

"Q Was this in person or by telephone?

"A In person, probably both."

Dropping down to line 16:

"Q What did Mr. Seider say to you and what did you say to Mr. Seider?

"A Mr. Seider had been in communication in New York

at that time with our counsellor, Mr. Tillinghast, in relation to Mr. Levy's seeming intention of pirating our record, and I believe my conversation with him," and I think that is a reference to Seider -- "on that occasion concerned purely matters of the legal aspects of our position in the light of this development."

Skipping over t page 158, line 3:

"I believe I informed him" and again that is Seider "of really of our surprise and our shock at the forthcoming event, Mr. Levy's unauthorized release of our recording, and I believe my conversation was general and firm and complete assurance to him.

"Q I didn't catch that?

"A An assurance to him that if Mr. Levy did so proceed, Capitol would seek, along with EMI, every available legal remedy.

"Q Did you tell him what legal remedies Capitol was considering at that time?

"A No, and I didn't need to. He was in conversation with my legal counsel.

"Q Was Capitol contemplating any legal action at that time?

"A We were contemplating legal action in the event that Mr. Levy encroached upon our property.

"Q What legal action was Capitol contemplating?

"A We were contemplating primarily first and foremost preventive action to insure that Mr. Levy and anyone else whom he might have associated with this, with this proposed course of conduct, at least were fully warned of our view of our rights so that they may at least not proceed to interfere with our rights unknowingly."

Now --

MR. PRETTYMAN: Would you read to line 15.

"Q When was this telephone conversation?

"MR. BERGEN: I think he has already testified.

"A Towards the end of January.

"Q Was anything further said in this telephone conversation with reference to Mr. Levy or any company with which he was affiliated?

"A Not that I can recall.

"Q When you referred a moment ago to preventive actions was Capitol considering any act other than issuing warnings?

"A Capitol's lawyers might have been."

Now, does this refresh your recollection that in January you were already discussing this with your attorneys and were telling Sauder that you were going to proceed to notify Levy so he would not interfere with your

rights unknowingly?

A I take it you are taking it in the context of the remark that these conversations were held at the end of January?

Q That's right. Your statement is towards the end of January.

A As I believe I said earlier to your question, your Honor, the question of what constituted the end of January in terms of the date and what started the first week of February is what I'm finding it difficult to pinpoint.

If there were in fact a weekend, as there must have been, between those two weeks, the last of January, the first of February, you aren't talking of very many working days on which such conversations could have taken place. I can't say that what you just read me has in any manner further pinpointed my recollection. It appears, as I was saying earlier, that I was having discussings with my own in-house legal counsel, Mr. Carp and Mr. Tillinghaus. They in turn were having discussions with Mr. Seider and his counsel. We had an outside attorney involved in these discussions as well, during the very last few days of January, going into the first few days of February. It doesn't help me to recall any better than that.

THE COURT: The thing that I want to make sure of, though, Mr. Menon, is this: We have certain events that you are testifying to now. You are testifying -- and if there is any correction to this at any time, you should make it -- but you have testified about hearing through advertising channels a day before the release of the Roots album, that is, about February 6 -- you recall that?

THE WITNESS: Yes.

THE COURT: Okay. And you have testified that that, aside from the information, so called, from Klein, was the first you really heard of an intention by Levy to issue his album, right?

THE WITNESS: Yes, sir.

THE COURT: Is that still your memory?

THE WITNESS: Yes.

THE COURT: Okay.

Now, you have testified that you learned of Mr. Seider's meeting with Mr. Levy on January 29 or 30, but you were not informed that at that meeting Levy announced his intention to go forward with his own album, is that correct?

THE WITNESS: That's correct.

THE COURT: Is that still your memory?

THE WITNESS: Yes.

THE COURT: Now, the conversation which was

mentioned in your deposition, in which you mentioned Tillinghast and so forth, at what stage would that have occurred, according to your best memory now?

THE WITNESS: I'm trying to construct it, your Honor. I can only presume that it would have taken place after Mr. -- the date of Mr. Seider's meeting with Mr. Levy, on the 29th or what have you, probably concurrent with the last -- Mr. Klein had called me on two or three occasions on this matter, in the course of two or three days and it could have been concurrent with the last of such calls that I received from him, and it was certainly during the date when we heard from the advertising agent, and obviously at the time when we sent the telegrams.

(Continued on next page.)

THE COURT: There are a lot of different dates?

THE WITNESS: I was suggesting, really, that if I could have a calendar and take a look and see if it was a weekend or see the number of days we are talking about --

THE COURT: What is the 29th?

THE WITNESS: The 29th is a Wednesday.

Now, I may have heard on the Thursday following that or the Friday, which is the 31st, that Mr. Seider had held the meeting with Mr. Levy. We then have the 1st, which is a Saturday, and I doubt if I had any conversation on the subject at all, and the 2nd, which is a Sunday, where again I would not have been conversing with anybody, I should think, on this matter.

I cannot really recall whether Mr. Klein called me on the 3rd or both days. The point I was attempting to make earlier is you are getting extremely close to the date on which we had heard from the advertising agency. What I am not able to pinpoint is whether between Monday, the 3rd, when I assume Klein started calling me or held the first of two or three calls --

THE COURT: You think the Klein calls occurred beginning that Monday, the 3rd of February?

THE WITNESS: Looking at this now, that my best

recollection. I am not sure whether it was Monday, the 3rd or whether it was late on Friday, the 31st. That is where I am finding it difficult to pinpoint it on the basis of an actual date. My best recollection is that it would certainly have been either of those two days, probably on the 3rd. It could well have been on the 31st.

Thereupon, we are really talking of four days by when the first of the telegrams were sent. With any degree of precision I am afraid I can't recall what was said to Mr. Carp and Mr. Tillinghast, who was also our in-house lawyer.

THE COURT: All right.

BY MR. KANZER:

Q Is it not a fact that you instructed Al Coury not to attend the meeting with Morris Levy on January 30th?

A I don't believe I instructed him not to attend a meeting.

Q Let me read to you from paragraph 95 of defendant's statement of uncontested facts.

"On January 29, 1975, Seider called Levy and told him that Capitol was going to put out the Lennon album and that Capitol and EMI had refused their permission for Levy to put out the Lennon album. At

Levy's request Seider made an appointment for Coury and Seider to meet with Levy that day. Seider waited for Coury but Coury had another appointment and, in any event, had been told by Menon that he should not attend the meeting although Seider did not know this at the time."

Does that refresh your recollection that you instructed Al Coury not to meet with Mr. Levy on January 30th?

A No, I believe it is probably a matter of nuance. My best recollection is Coury's asking whether he needed to attend the meeting and whether he perhaps should attend the meeting.

What I do not recall is giving him a specific instruction not to attend the meeting. In an answer to a question as to whether he need or whether he should, I might very well have said, "You don't need to," and left it at that.

So it is really a matter more of nuance. I have no recollection of having specifically made an issue of it with him.

Q Did you discuss these amended statements of uncontested facts with your attorneys before they were filed?

Wasn't this amended set amended for the

specific reason that the earlier set that the defendants had filed had contained inaccuracies which, after discussing with their clients, they detected?

MR. BERGEN: Objection. I think there are two questions there.

MR. KANZER: I think he understands the question, Mr. Bergen.

A I don't know. I don't know whether it represent correction of earlier statements.

Q May I read to you from the beginning of defendants' exceptions to plaintiffs' statement of facts and defendants' joint statement of facts.

At page one. "Defendants by their attorneys hereby request the Court's permission to make certain limited corrections in their joint statement of facts disputed facts and facts not disputed previously filed with this Court on November 7, 1975, and as grounds therefore state that:

"One,depositions in this action were taken up to a few days before the date on which, by order of this Court, defendants' statement of facts was due. Consequently, the statement of facts had to be continuously reviewed virtually up to the last minute prior to filing.

"Two, unlike plaintiffs, who are controlled by a single individual, Morris Levy, located in New York, and represented by one law firm, the defendants comprise two individuals and three companies. One company is principally located in London and another in Los Angeles, one individual resides in New York and the other spends a substantial portion of his time in Los Angeles. Defendants are represented by three sets of attorneys. Consequently, there were serious problems in attempting to coordinate the submission of a joint statement of facts and in obtaining, at the last minute, the necessary permission for filing."

THE COURT: It isn't necessary for you to read all that.

MR. KANZER: The next sentence is the key one.

"As a result, a few inadvertent errors and omissions are contained in the defendants' joint statement of facts.

"Three, defendants believe plaintiffs will not be prejudiced by these limited corrections since they merely reflect a more accurate rendition of what already appears in the pretrial discovery record that has been continuously available to plaintiffs."

MR. PRETTYMAN: If it will help, your Honor,

it was not with Mr. Menon that we consulted on the West Coast.

THE COURT: Where do we stand? I think we have got to --

MR. PRETTYMAN: You asked for a piece of information. You asked me to check and find out the date, the release date for Rock 'n' Roll. I am told we actually released 300, which is a very small number, on the 12th but that the 13th is considered the real release date because that is the first time that anything of substance was sent out.

THE COURT: Give me that again.

MR. PRETTYMAN: A very minimal amount of 300 albums were released on the 12th. The real release date is considered to be the 13th because that is the first day when any substantial number was sent.

THE COURT: I will take that as a fact unless somebody corrects it.

Where do we go from here, Mr. Kanzer?

MR. KANZER: I would like to continue with my questioning.

Q I would like to read the witness a brief passage from Alan Klein's deposition in this case to see whether it refreshes his recollection.

At page 88, line 18.

"Q I believe" -- and I believe the questioner was Mr. Prettyman.

"Q I believe you indicated that in that January 29 conversation with Mr. Levy you in effect asked for permission to pass along his message to Mr. Menon. Have I correctly stated that?

"A Yes. I pretty much told him that I was going to have a problem not doing it.

"Q Did you in fact call Mr. Menon about that?

"A Immediately."

Does that refresh your recollection that on January 29 Mr. Klein told you that Mr. Levy was going to release the Roots album?

A It does not refresh my recollection as far as the date is concerned necessarily.

Q Do you know whether Mr. Levy attempted to reach anybody at EMI, specifically Mr. Wood, prior to February 7 in connection with advising Mr. Wood that Mr. Levy was contemplating putting out the album?

A I had heard that Mr. Levy had attempted to contact Mr. Len Wood in EMI. I cannot recall when.

THE COURT: I am sorry. This doesn't help. You are asking if he knows that Levy tried. If Len Wood at EMI was in fact talked to by Levy at some date, that would have significance, yes, it would be an admissible fact, but for him to sort of try to think what he has heard from various sources isn't very helpful.

MR. KANZER: Your Honor, we have the misfortune nobody from EMI has been presented to this Court as a witness.

MR. PRETTYMAN: Mr. Levy testified about this, your Honor. He said he tried to put in a call, he never reached him and that wasn't the reason he put in the call. He put in the call because he thought he could settle it

with him.

THE COURT: Is there any contention Levy really reached him?

MR. KANZER: No. We are only trying to show, your Honor, Mr. Levy tried to reach Capitol, he tried to reach EMI all before any of these events took place.

THE COURT: That is for Mr. Levy to testify.

MR. KANZER: I believe he has testified, your Honor.

THE COURT: Then that's it.

Q Mr. Menon, if I understand your testimony of this morning correctly, it is your testimony that as soon as Capitol learned of the intention of EMI to release an album of Rock 'n' Roll records of Lennon Capitol rushed to come out with its own album, is that correct?

A Yes.

Q Let me read you from your deposition at page 177, line 21.

"Q When Capitol first learned that Mr. Levy was contemplating releasing this recording which has been marked as Exhibit 8 and 8A for identification" --

MR. KANZER: That refers to the Roots album.

Q --"did Capitol attempt to expedite the release of the Capitol recording, Exhibits 7 and 7A for identifi-

cation?

"A It was our intention to release it as quickly as possible anyway. I am not -- I cannot recall that we may have, that we expedited it to any unusual degree. We probably did, but I am not -- there is nothing clear in my mind about that having been a dominant factor."

Does that refresh your recollection as to whether in fact Capitol was rushing to get this album out because of Mr. Levy or his company's intention?

A Yes. I think again the only extent it refreshes my memory is in terms of the new answer of what was expeditious at the time. My best recollection is that our intention was to go with this album sometime in the Spring. Whether that would be in March or April, I cannot say. There is no question, however, in my mind today that when information confirming Levy's intention of going ahead with this television package arrived we took exceptional action to manufacture and place and offer for sale, our own recording, and, in fact, from the new dates we have just heard it would appear we did this within about a week's time.

It's a question of whether something that would probably otherwise have been put out around March or April, perhaps more likely April, was especially expedited due to the new information on this Levy album having come, and I

think we did.

THE COURT: What if you had had a month instead of a week to do the necessary and manufacture the records and produce the jacket and develop your advertising and so forth, would you have done a better job?

THE WITNESS: Unquestionably, your Honor, unquestionably.

THE COURT: What do you think you could have done in a month that you couldn't do in a week?

THE WITNESS: We could have -- I testified earlier this morning about the procedures by which a general marketing plan or a concept for a general marketing plan achieved a degree of specificity in terms of murals you take, like producing a television spot for instance, engaging in probably more dialogue within the company and in far greater importance in this case with respect to this particular artist, obtaining a closer silloquy with the artist in discussion with him as to production aspects of it.

It just happens to be impossible to produce a television spot and a radio spot and so on within the time of a week with the same efficiency you can over a longer period.

(Continued on next page.)

THE COURT: You are talking about television spots, radio spots, right?

THE WITNESS: Press advertising, a variety of other matters that are really details of a marketing thrust that would surround the release of an album, both before its actual release date, certainly concurrent with its release date, and in support of its first few months of sale, if you like. That whole process.

THE COURT: Suppose you are rushed at the very beginning. Can't you change the things and get the spots better if they are faulty?

THE WITNESS: Yes, but you cannot achieve your highest result at the time at which you really need it. There is a father special merit and a need to do some of these supportive things either shortly before the actual availability of the record to the public; the process within the whole structure of distribution from the manufacturer through to the consumer has within it a wholesale and a retail trade, if you wish.

We have different types of customers who act as arteries for the product from the manufacturers who are ourselves to the consumer and finally displayed for sale. There are a variety of activities at that level which have to be done in a timely way and there is no way you

can catch up with time if you put the record out and haven't had an opportunity of developing those supportive methods. That is what I meant.

THE COURT: If you had had say a month instead of a week, could the jacket have been better? Do you think the jacket could have been improved? Is that one problem?

THE WITNESS: Very probably.

THE COURT: What way would the jacket have been improved?

THE WITNESS: It is a difficult question to answer for two reasons:

Firstly it is not my special field of expertise, and we have people who will be able to speak about this more knowledgably.

Secondly, I think a review of Mr. Lennon's album jackets, where we have had the proper required amount of time to devote to both the conceptual as well as the production aspects of it would probably make my point rather more obvious if you were to contrast it to what we were able to achieve with this.

There is no means of establishing this except to say that it is the practice of the company with relation to Mr. Lennon to obtain from him a very considerable

amount of his own contribution to the packaging art and the graphics that are involved in it.

It is regarded as being very integrally a part of the product and its presentation. In some instances it is regarded as being of a degree of importance almost approaching the sound recording itself inasfar as it is a part of the total package that the consumer buys.

I can only say that we were not able to obtain, despite these conferences that had taken place with him on one evening in New York, the end of January, the sort of time that may have guaranteed the best possible result.

Now whether the expense of that time would have artistically or commercially actually accomplished a better result I obviously can't say for sure. The presumption is it would have and that is the presumption in this industry in relation to its products.

THE COURT: Anything else?

MR. KANZER: Quite a bit, I'm afraid, your Honor.

Q I'm not clear on whether you were just stating just now that it was only the execution of the concept that was interfered with or the package itself, because if I understand correctly your earlier testimony, John Lennon on January 28th or 29th, before you were aware of the Roots album competition, had already approved the

entire concept of the package, the jacket, and that very evening the photograph that was ultimately used on it had been approved.

THE COURT: That is argument, Mr. Kanzer. If you want to argue you may argue, but don't ague with the witness.

MR. KANZER: Your Honor, there has been quite a bit of summation by defense counsel during my cross examination, so I apologize if I have gone overboard.

Q I believe this morning, Mr. Menon, you were telling us that normally it is desirable to wait about 11 months or so before another John Lennon album comes out. Did I correctly understand your testimony?

A I believe you incorrectly understood it.

Q Would you clarify, how long?

A I thought I said six months.

THE COURT: Yes, he said six months.

Q Do you recall your testimony about the release date of the John Lennon package vis-a-vis the Mind Games and Walls and Bridges, and that you ended up putting it out before you thought it was timely; is that correct?

A I didn't get the syntax of your question.

Q Is it correct that your testimony this morning was that you were forced to put out Rock 'n' Roll earlier

than it should have been in relation to the other two albums, Mind Games and Walls and Bridges?

A In relation to Walls and Bridges, yes. Mind Games had come out more than six months before we put out Rock 'n' Roll.

Q Do you recall a conversation with Harold Seider that took place, I believe, sometime in January of 1975, I believe it was approximately the 14th of January, in which there was a discussion as to the timing of releasing the Rock 'n' Roll album?

A I remember the discussion, yes.

Q Do you recall what position Mr. Seider took during that discussion?

A On what issue?

Q On the question of the release date or proposed release date of John Lennon's new album.

A I cannot recall with any clarity as to whether we were attempting to fix a specific release date, Mr. Kanzer. However, the subjects, one of the subjects that was under discussion at that meeting did have a bearing on this release date, and that was Mr. Seider's inquiries of my marketing executives who were present at the meeting, principally Mr. Zimmerman, but also Mr. Al Coury, as to what the situation in the marketplace was currently,

at that time, with respect to Walls and Bridges. I believe we spent quite a lot of time in discussing where this product had positioned itself in the marketplace over the previous month, the peak Christmas sales period, discussions on what could be done to extend its support in the marketplace, and obviously we emphasized our plans to concentrate on the projection of that album, and to get as much more mileage out of it as we possibly could.

In that connection, there was a definite presumption, as I recall it, that the next album, which turned out to be the Rock 'n' Roll album, and was at that time going to be obviously the Rock 'n' Roll album, since it was in an advanced stage of production, at least the sound recording was, that there was a presumption that the release of that album should not be made in any manner that might preempt us from accomplishing our goal of getting the maximum possible action for Walls and Bridges.

Q Do you recall whether Mr. Seider took the position that a release some time in February or the beginning of March would be precipitous and would injure the sales of Walls and Bridges?

A I can't remember that specifically, but it sort of does seem to ring a bell.

Q Do you recall what position you took?

A No. I think we were -- again, the difficulty -- I don't believe that this was one of the -- it was a sort of specific different agenda item we had to cover, everything through different matters. It was a part of an overall discussion of what Capitol was doing, should do, could do, had in fact done over an important sales period in December and November for the support of Mr. Lennon's products, principally, Walls and Bridges, because that was his latest product.

We have a constant attention that we bring to all Mr. Lennon's works. They constitute -- they are part of, as I mentioned earlier this morning, they are part of, I think beyond question, the most important recording catalog of music in this industry in the world, so we pay attention to works of his that have been published since he started recording for us, both in his capacity at the time, as I remember, of the Beatles group as well as in his individual capacity, so the discussion with Mr. Seider was one that was more, it was comprehensive of everything that the company was doing in support of Mr. Lennon's recorded work.

More specifically, if I may say so, obviously with respect to the latest of his releases, which was Walls and Bridges.

The consideration of what the release date of the next album should be is material to this in the sense that, as I believe I mentioned earlier, there is a presumption that you don't want to dilute your efforts or to diffuse the image of the artist by over-releasing within a period of time, and it was against that context that we may have exchanged thoughts on the release date of Rock 'n' Roll, but I have no more specific recollection of that aspect of the general discussion at this time.

Q Mr. Seider, in a deposition in this action, testified as follows, at page 239, line 9, and following of his deposition:

"A I thought that that might be an inappropriate time."

MR. KANZER: And he is referring to the end of February or sometime in the beginning of March.

"A Because John's album or then present album called Walls and Bridges, which had been released to the end of September, still had a great deal of sales potential and that there was a good deal of life in it, and that the release of another album might impede the sales of the Walls and Bridges album, both. I shouldn't say both, but Brown Meggs and Bhaskar and Coury disagreed with that comment."

Does that refresh your recollection that

you did not at that time think that a release of the Lennon album, the new Lennon album would interfere with sales of previous albums?

A No, it rather tends to confirm my recollection of what I just said, which is that I think we had in mind --

THE COURT: I think we have heard -- I don't think there is a lot of use in reading somebody else's deposition.

Let's finish up just as well as you can.

MR. KANZER: I have quite a few more questions, your Honor.

THE COURT: We will go to 5:00, and you do as much as you can before 5:00.

MR. KANZER: Surely.

Q Now, Mr. Menon, you testified this morning about the decision on price of the album Rock 'n' Roll being affected by competition with Roots, or potential competition. Was that the primary or the sole determinant of the price of the Rock 'n' Roll album?

A It was the primary determinant.

Q What were the other reasons?

THE COURT: He has given those.

MR. KANZER: Well, your Honor, I do think I

can inquire as to whether there were any written memoranda or other records --

THE COURT: Of course, but that isn't the question. You said what were the other reasons. He has told us that this morning.

MR. KANZER: I want ti inquire further, your Honor, if I may.

THE COURT: On what?

MR. KANZER: I think I am entitled to ask him a few questions as to whether in fact those other items were in fact of equal or not greater weight than this one.

THE COURT: Start with that. Of course you can.

Q Were not other reasons the fact that this was an album that was of old rock and roll songs and that there was fear that this album would not be favorably received?

A That was another consideration that was entirely a part of the primary reason, the primary reason, the one that you stated, that the Roots album was coming out on television.

As I believe I said this morning, our anxiety at that primary event was heightened by the fact that this present album was a new recording, but of old

compositions. It was also further aggravated by the economic situation, that the marketplace found itself in at that time, but neither of those other two factors would have had any bearing but for the primary factor. It was the special importance that the primary factor took against the background of these other two.

Q I'm not quite clear on why the others would have had no bearing whatsoever but for the fact of Roots. Assuming there was no Roots album at all; would you still not have the problem that you had an album of rock and roll songs that you feared, or your company feared might not be favorably reviewed?

A I wouldn't describe it as a problem. You would have had a feature, I'm not certain that there was any apprehension that it would be unfavorably reviewed. I think I might illustrate my point by saying that for the last, since April 1971, since when I have been working for Capitol, we obviously have put out hundreds of records on a monthly basis; I can only think of one extremely isolated instance, other than the Rock 'n' Roll album, where we went out with a recommended or suggested retail price lower than that which was normal for that category of record and that was for an entirely new group of artists which we did on a purely experimental basis once

and never did it again.

Now, in addition to this, in the month of February, Capitol obviously put out on release a number of other albums aside from the Rock 'n' Roll album.

Therefore, in similar economic environment that particular month, we were not persuaded to set a recommended retail price lower than $6.98 for any other album, and if you take into consideration that we do not have, in our judgment, an artist of a comparable caliber of Mr. Lennon, and if we did not feel compelled by the economic circumstances alone to place any of those records out at lower than the $6.98, then it is unlikely --

THE COURT: You are asking for an explanation that he has explained.

MR. KANZER: I'm not objecting to his explanation. I plan to go into detail with him. The more he wants to explain it, it is perfectly acceptable to me.

THE COURT: All right.

A May I just conclude my explanation?

THE COURT: Okay.

Q Were these other recordings --

THE COURT: No, he hasn't concluded. I interrupted him. All right.

Q Have you concluded?

A I have not.

Q I'm sorry. I misunderstood.

A Equally with respect to the other consideration, that of older compositions, it may interest you to know that Capitol has for instance made new recordings of older compositions by artists other than Mr. Lennon, artists not of Mr. Lennon's standing in the marketplace, anything comparable to his field of importance. One that I have in mind is a recording by the Band.

THE COURT: Who?

THE WITNESS: A group of musicians called the Band.

MR. PRETTYMAN: The Ban, B-a-n-d.

A Recording for Moondog Matinee which featured older compositions exactly as the Rock 'n' Roll album did. Artists not of Mr. Lennon's standing. That circumstance alone did not persuade us with respect to Moondog Matinee, to put the record out at a suggested retail price lower than what was then prevalent, which at that time happened to be $5.98.

What happened with respect to the Rock 'n' Roll album was, we were confronted with a situation where --

THE COURT: I get your point. Can you go on to something else, Mr. Kanzer?

jkrf 14 Menon-cross

MR. KANZER: Your Honor, I have quite a few more questions on this point. I don't really want to pass it off at this point. I think it is a very important part of this case. They have introduced for the first time today an argument that they changed the price of the album primarily because of this.

THE COURT: I think we are hearing the same thing over and over- Now let's bring out any new points you need to bring out and then get on with it.

BY MR. KANZER:

Q Isn't it a fact, Mr. Menon, that in your deposition in this case, when you were asked what the reasons were for the change of the price, that is the selection of $5.98, that the last reason you gave almost -- I won't say it is an afterthought, that is argument --

THE COURT: Do you want to read his deposition? It speaks for itself.

MR. KANZER: Yes, I do.

Q Page 247, line 16:

"Q What was the basis for deciding to have a suggested retail price of $5.98 for Rock 'n' Roll?

"A There were several considerations. Those that come to mind are, one, the condition of the marketplace in the first quarter of this calendar year, especially

as it seemed to affect Capitol sales. In addition to Capitol's beliefs about the general state of the industry sales, getting back to two months prior to the first quarter, that was one consideration.

"The second consideration was the fact that all the titles or none of the titles, compositions recorded on this particular album were original new compositions that had not been exposed in terms of performances by other artists to the public before. In fact, they had been exposed for public sales by performance of other artists of those compositions.

"The fact that we had knowledge that an unauthorized pirated version of this album was most likely to be exposed for sale to the public despite our forthright attempts to prevent this, and more or less in keeping with my answer to a previous question of the outright damage that this whole thing had done, the effect that that had or would have since it seemed very likely that it would take place in this instance on a legitimate retail business to merchandise, merket, support and promote Mr. Lennon's works, we took that into consideration, too."

MR. PRETTYMAN: Your Honor, that is completely and totally consistent with his testimony. He wasn't asked --

THE COURT: We don't need any argument. He has read the deposition. It will speak for itself. Let's go. What else?

Q When did you learn for the first time that Roots was no longer being offered to the public?

MR. GRUMBACH: Your Honor, I object to the question. The testimony in the case is that it was offered to the public until the date of trial.

MR. PRETTYMAN: And may still be so far as we know.

MR. KANZER: I will rephrase the question.

Q When was the first time that you learned that Roots was no longer being advertised for sale to the public?

A I can't recall. Probably three or four months after it had been started to be advertised.

Q When did you first learn that RCA Records would not act as the retail fulfillment organization for Roots? Excuse me, it is the sales fulfillment organization for Roots?

A I'm terribly sorry, can I have the question back.

THE COURT: May I interrupt you, Mr. Reporter: Did you ever know that RCA acted as the distributor or whatever, the place where people could order records for Levy records, did you ever know that?

THE WITNESS: I thought what RCA was doing was physically actually manufacturing the records. That is why I wasn't quite clear as to how this service or fulfillment, whatever it is, came up. I didn't know that and I still don't know what the meaning of that service was.

THE COURT: How could he know when it was discontinued?

Q Did William Dyczko of RCA communicate with either Carp or Mr. Tillinghast of Capitol before February 15, 1975 and advise Capitol that RCA was not going to act as a -- doing anything with respect to the Roots album, as Capitol had requested?

A I have no idea. I have not heard of Mr. Dyczko. I know we sent some telegrams asking them to desist from

pressing these records for Levy. And I have no knowledge as to whether Mr. Dyczko informed Mr. Carp or Mr. Tillinghast of his view on the matter.

Q Isn't it a fact that you knew in February of 1975 that Roots had been taken off the air?

A You mean the television advertising?

Q Yes.

A No, I can't say that I knew in February, or I can't recall now that I knew in February that it had been taken off the air.

As a matter of fact, I believe I testified that I knew in February that it had been on the air.

Q Isn't it a fact that the Plaintiffs' commenced their action in the State Court on February 19, and served Capitol with their complaint on that very day?

MR. PRETTYMAN: I object to the question. I don't understand the purport of it.

MR. GRUMBACH: They changed the statements in their complaint on the day, in this trial, so these are not necessarily true now.

THE COURT: Let's adjourn. We have labored long today on some points, we particularly labored on the question of whether Capitol was rushed into producing the album in a way that was not up to standard and that this

was the fault of Mr. Levy.

Now, I would like you to think overnight, before we go on and on, on that subject: Mr. Levy wrote a letter to Marshall, Bratter on January 9. Now that letter was not addressed to Capitol, I know, but it was communicated to Mr. Seider within a matter of days, the substance of it.

Mr. Seider was in touch, during this period, with the people at Capitol.

Now, if Mr. Seider or if Marshall, Bratter had told Capitol about that letter, that would have given Capitol notice on January 9 or within a matter of days thereafter of Levy's position.

Now, the fact -- I have testimony from this witness that it is his best memory that he had nothing except possibly the kind of, what he termed, unreliable information from Alan Klein, he had nothing except information from Alan Klein, about any intention of Levy to market that album until a day or so before the release of the Roots album, and he got it through advertising channels.

Well, he places that about February 6, and that is close enough for purposes of discussion; at least summarizing his testimony.

Now, there is a big difference, and I would

think there would have been a big difference to Capitol if Capitol had known on January 9th or January 13 or so, rather than learning about this problem on February 6, and I think it could have made approximately a month's difference in what Capitol did, whether it was file a lawsuit or produce its record, or whatever.

Now, I was frankly surprised at what I heard, and of course, all the evidence isn't it, and maybe Mr. Menon will be contradicted by Mr. Seider or other witnesses. But this is Capitol's witness; principal witness, or this is a witness of Capitol.

Now, it does seem to me to raise some questions about whether we should assess Levy for the damages caused by Capitol of having to rush into production about February 6 or so, and having to turn all its wheels in that brief moment. I mean, I really wonder if it is levy's fault, and I'm focusing on the delay. I mean there are lots of things. I have already held that Levy had no right to issue the record and so forth and so on. But the question of the delay -- delay isn't the right word -- the question of damages flowing from the fact that Capitol was so rushed is a very serious question of who is responsible for that.

MR. PRETTYMAN: Your Honor, if I may just address myself to it very briefly, I would like to point out

to you that it would have been the easiest thing in the world with Mr. Levy claiming all the rights that he had, and yet being as aware as all of the testimony shows, that he was of the problem with Capitol and EMI and getting approval and all the rest of it, to instead of writing letters to Mr. Dolgenos, to write letters to Capitol and to EMI, and instead of that, he was sending messages indirectly that he was interested but in terms of an actual claim of right and putting Capitol and EMI directly on notice that he was claiming a right that in regard to a star, whom everybody in the industry now was under exclusive contract to them, that he claimed that there was some kind of hole in the contract, that he claimed that therefore he had the rights to do what he was doing -- I suggest to you sir, that the burden was upon him to contact us, and that we should not be held not to be able to obtain damages from him because he choose to remain silent.

I would also remind you, sir --

THE COURT: I'm not so sure that Levy wouldn't have reason to assume that Seider would be informing Capitol and EMI all along. I mean, Seider was the constant contact in this situation of Levy. I don't have any testimony that Levy told Seider to keep it secret.

MR. PRETTYMAN: You don't have any testimony he

every asked him to communicate anything either.

THE COURT: Yes, I do. I have testimony of Levy that he did ask to have Seider communicate it, and I have not found against that testimony, and I think that you have got to deal with human nature.

If you or I were going along for weeks or months in the way that Levy was going on, really negotiating with Seider -- and there is no question there were discussions about Seider communicating with EMI and getting permission for something -- I mean there are different versions of what the permission was supposed to be of, but in any event, I find it a little bit difficult to say that Levy should have been sending copies to everybody concerned of all the communications.

First of all, there were discussions. I think that he might well have assumed that Seider was keeping Capitol and EMI informed, and so that if he sent a letter to Dolgenos at Marshall, Bratter, are you going to say that yes, it would have been nice to send a copy to Capitol, but, you know, you can hold the fellow for a lot of money because he didn't do that.

MR. PRETTYMAN: Let me make just two brief points, just two.

I would remind you that in thatletter he was

claiming worldwide rights.

THE COURT: So?

MR. PRETTYMAN: And your Honor has held and they now agree, late in the case, that he never really had worldwide rights.

THE COURT: That has nothing to do with what I'm talking about.

MR. PRETTYMAN: I do think so because I think it explains why he wasn't sending copies of these letters to EMI or Capitol, because he would be sending a copy of a letter claiming a right which he knew he didn't have at the time. The other point I'd like to make to you, sir, is that regardless of what happened until January 30, and what rights he might have thought he had on that day, in other words, whether Apple had the right to give it to him, or EMI, or Capitol, on January 30 he was definitely informed by Mr. Seider that nobody was going to give him any rights. As of that time, that particular moment in time, no matter how he interpreted any contracts, he was told, you don't have it from Apple, you don't have it from Capitol, you don't have it from EMI and you can't put out this record.

At that point he deliberately decided to put it out anyway.

Now, I just don't see how you can get around

that.

THE COURT: Mr. Prettyman, I think we have got a lot of elements of damages here that we are talking about, and I think we have got to be careful and not raise -- I find this one a pretty -- I think some of the claims that are being made on the counterclaims are really rather strained, and I think that if you could think overnight, and let's stick to basics, there is no question in my mind -- well I shouldn't go that far, but certainly there is a very basic question about the use of Mr. Lennon's picture on that album.

There is a statute that says you can't do it. There is a question about the use of property in music, and I thought that we were going to get down pretty quickly to damages about those.

Now, I know that it is tied together to some extent. In other words, any claim that the album didn't do as well as it should have obviously is related to everything about that album, including a poor cover, if there was one, poor sound and so forth, poor advertising. But you are going to have to -- I guess I can't suggest anybody withdraws any claims, but I tell you, Mr. Prettyman, you are going to have to wrestle with a question which has been in this case a long time, and that is what I'm coming more

and more to believe, if the facts here today are true, that there was an inexcusable concealment of information from Capitol by Seider, and that is a factor to me -- and I'm not just going to sweep that out of the case.

Now, if Mr. Seider wants to get on the stand and contradict Mr. Menon and say I toldhim all these things earlier dates, that is fine. Maybe he will do that.

MR. PRETTYMAN: Your Honor, the thing I don't quite understand is this, that if we have been damaged by Mr. Levy in his taking this tape, which was given to him for listening purposes, as you said, and ruled, and he turned it into an album after the time that he was told he had no rights from everybody, if we have been damaged by that, why is it that we cannot recover damages because some third party chose not to impart some information to us?

THE COURT: The third party not choosing to impart information, it begins to appear to me as a very substantial part of your timing problem. If timing is important, and this witness has testified timing is very important, he said one month would have made a difference -- now if timing is important, who is responsible for the timing? Who is responsible for having this thing all appear February 6 when -- I grant you on February 6, I mean if I had been in Capitol, I really don't know what I would have figured

out to do. I think if it really came to them on February 6, I think they were doing pretty well to get those telegrams out or figure out anything to do. But whose fault is that?

I just leave that with you, because I think you've got to, you know, have some -- there is a range of fairness. You can't just tag everything to this in the world to Levy.

MR. PRETTYMAN: I have been surprised myself at the amount of time spent on this one factor today because it did not loom as large to me certainly as the testimony you are going to hear tomorrow about loss of sales. But when my people tell me and when I ask for the facts, and these marketing people sit down and tell me about the time that they had trying to get this thing out and the impact that it had because it did hit, I have to put that testimony on. It's part of the picture.

THE COURT: Of course you do.

MR. PRETTYMAN: But I certainly don't want you tothink it is the largest part of the case. I don't rest on that as being the larger part of the damages that we suffered as you will hear tomorrow.

THE COURT: Okay.

MR. BERGEN: I really beg the Court's indulgence

for three minutes. There have been a number of statements said in the last few minutes about one of my clients. I can't help what Mr. Menon has testified to today, but there is testimony in this record from Mr. Seider that on the night of January 30, after he had the meeting with Mr. Levy in which Mr. Levy announced to him that the record was going out, he turned around and played the tape, "You Can't Catch Me", that he and Mr. Lennon called from Mr. Lennon's apartment Mr. Coury in California, and told Mr. Coury about Mr. Seider's meeting with Mr. Levy; they also spoke to Mr. Tillinghast that night, there is also testimony and there is a telegram in the record, from Mr. Lennon on the morning of January 31st to Capitol, Exhibit YYY, advising Capitol, addressed to Mr. Tillinghast, and this telegram was as a result of the conversations between Mr. Seider, Mr. Lennon and Mr. Tillinghast and Mr. Coury on the night of the 30th, the telegram was sent at 8:49 in the morning, that he hadn't made any deal with Mr. Levy, so that, you know, Mr. Seider advised Capitol immediately -- I can't help it that Mr. Menon doesn't seem to remember that at that time.

THE COURT: What's the telegram?

MR. BERGEN: The telegram says, it is dated the 31st, sent 8:49 in the morning, signed by Mr. Lennon, and

it is addressed to Mr. Tillinghast, and it says: "I have not on my behalf or on behalf of Apple Records, Inc. granted anyone other than Capitol any pressing and/or distribution rights with respect to any recordings of my performances, and so far as I am personally concerned, Capitol and Apple may proceed forthwith to bring any necessary action in Apple's name to stop any such pressing and distribution and such action shall be at Capitol's sole expense."

That telegram, I believe Mr. Seider testified, was as a result of these conversations that he and Mr. Lennon had with Mr. Coury and Mr. Tillinghast on the night of the 30th, after Mr. Levy, I mean, after Mr. Seider went to Mr. Lennon's apartment and told him about this meeting, because you will recall, also, that Mr. Lennon testified that at that point he had gotten a message through May Pang that Mr. Levy was putting out the album, so Mr. Levy told Mr. Seider in the face-to-face meeting that afternoon, he communicated it to May Pang to pass on to John Lennon, she did that. Lennon and Seider immediately, I think their testimony matches on this, v immediately contacted each other, and they met that night, and they telephoned Capitol and told Capitol of the meeting.

THE COURT: What did they tell Coury? Did they telephone Coury?

MR. BERGEN: Yes.

THE COURT: What did they tell him?

MR. BERGEN: They told him of the meeting with Mr. Levy and that Mr. Seider, Mr. Lennon had gotten the message and Mr. Seider had been told that Mr. Levy was going to put out the album, and it was as a result of that conversation that I believe Mr. Seider had a subsequent conversation late that night, because you will recall, you know that there is a three-hour time difference between here and California, they had another telephone conversation in which Mr. Seider and Mr. Tillinghast discussed the matter, and I believe this telegram was a result of that conversation between Tillinghast, the lawyer for Capitol, and Mr. Seider.

MR. PRETTYMAN: Your Honor, I might say I think it would be helpful for me to say I essentially agree with what has just been said. I think that that recitation is essentially correct that we do not claim that Capitol did not get notice of the January 30 turn down. We do claim that we did not get notice ahead of that time.

THE COURT: All right, well, that's helpful. What about the January 9th letter? Was that ever conveyed to Capitol?

MR. BERGEN: No, it wasn't. Except on February

the 5th. I don't know whether Mr. Seider testified about this. I will check his testimony tonight. But I was at a meeting where Mr. Seider showed the people from Capitol that letter. But it was not communicated, the substance of that letter was not communicated prior to that time. I don't believe that Mr. Seider testified that it was or that he ever passed that on.

MR. GRUMBACH: Your Honor, just one point. You have been asking about this January 9th letter, and the substance of what you seem to be driving at is that somehow Capitol should have, on January 9th, begun to plan the release of the album.

THE COURT: No, no, please don't. I just think that it would have been desirable if Capitol had been informed of the letter of January 9th. I don't understand why it wasn't.

MR. GRUMBACK: Okay, but the point --

THE COURT: Don't try to tell me, I don't know what Capitol should have done.

MR. GRUMBACH: Fine, but your Honor, the only point I just wanted to make was that it was not until January 30 that Mr. Levy spent a nickle to put out his own album, after Mr. Seider had turned it down.

THE COURT: So?

MR. GRUMBACH: I think that that shows that in terms of suggesting that anybody on the defendant's side should have assumed that Mr. Levy intended to put out an album, Mr. Levy didn't intend to. He hadn't gotten a thing going to put that album out until after his meeting with Mr. Seider. That is when he called everyone in.

MR. BERGEN: Furthermore, nobody forced him to put it out. Why instead of putting it out, and bringing us all here today, why didn't he do something? Why didn't he stop it instead of just charging ahead, putting the ads out on television, putting the album out and really provoking this whole thing?

THE COURT: Well, the majority seems to be against Mr. Levy.

(Adjourned to 10:15 a.m., March 18, 1976.)

bsrf

Big Seven Music Corporation et al.,

vs 75 Civ. 1116

John Lennon, et al.,

New York, New York
March 18, 1976 - 10:15 a.m.

(Trial resumed.)

B H A S K A R M E N O N, resumed the stand, having been previously duly sworn, testified further as follows:

CROSS EXAMINATION

BY MR. SCHURTMAN:

MR. SCHURTMAN: If Mr. Kanzer should return while I am cross examining, can he take over?

THE COURT: There should be very little left to do with Mr. Menon. Go as fast as you can.

We have a lot to do today.

Q Mr. Menon, to finish up the subject of the alleged rush in putting out your album, can you give us any information as to the loss of sales which you attribute directly to this alleged rush?

MR. PRETTYMAN: Your Honor, I'm having the witness testify in detail about these lost sales, and I'm pointing out that it seems to me that this is a waste of time.

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MR. SCHURTMAN: If the witness doesn't know the answer he can certainly say so. I object to Mr. Prettyman making these interruptions. It went on all day yesterday and I don't think it is a proper objection.

THE COURT: We are having a lot of fillibustering now. Try and answer the question. If you can answer it do so. If you can't answer it say you can't.

A I wouldn't know.

Q You said yesterday at the tail end of your testimony that you didn't learn until April that Roots had been taken off television. From whom did you learn that?

A It would either have been from my lawyers -- probably from one of my lawyers.

Q Didn't anyone at Capitol tell you that as soon as Capitol sent its telegrams to the television stations in February the TV stations stopped running Roots and that the last commercial --

MR. BERGEN: I object.

MR. PRETTYMAN: Objection.

MR. SCHURTMAN: Will you let me finish my question, please.

Your Honor, this is outrageous.

THE COURT: It really is. There is no excuse

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for this.

MR. PRETTYMAN: Your Honor, I thought he had finished his question. I apologize.

THE COURT: I think it was perfectly evident he hadn't. Let's proceed.

Q Didn't anyone tell you that the last Roots commercial appeared on February 16, 1975?

A No, I don't believe so.

Q Did you ask anyone?

A As to whether it finished on the 16th?

Q You had given directions to send out telegrams in early February. Did you follow up to see what the TV stations were doing; were you interested?

A I was certainly interested, yes.

Q But you didn't ask anyone?

A I can't recall whether I asked anyone or whether I was -- whether I was told, but I certainly knew around April that it had stopped.

Q Once Capitol learned that Roots was no longer being advertised, did Capitol make any changes in its sales and promotion program?

A Any change attributable to the stoppage of the advertising?

Q Did you increase your promotion, did you change

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the format of your promotion, or don't you know?

A I don't know.

Q Did you give any directions that Capitol increase its promotional efforts now that Roots was off the air?

A No, I don't believe I did.

Q Do you know why not?

A It is not within my area of function to issue directions of that sort to the Marketing Department. They tended to that by themselves.

Q Did you discuss it with anyone?

A Oh, I don't think I did.

Q Now, on the question of the 5.98 price, did you give any thought to the possibility of raising the price to 6.98 once Roots went off the air?

A No, I did not.

Q Mr. Menon, Roots went off the air three days after the release of your album --

THE COURT: Mr. Schurtman, it is impractical. Let's not grasp at straws.

MR. SCHURTMAN: My next question will be they have done it in the past on other albums, your Honor.

THE COURT: All right. I'm sorry.

Q Haven't you changed your price on albums that were released in the past?

A Within ten days of the release?

Q Within any time.

A Not to my knowledge.

Q You've never done that?

A I'm sorry, I didn't get your question.

Have we ever raised prices?

Q Let me make it very precise.

Has there ever been an occasion when you put an album out, say at the 5.98 price, and you then changed the price to 6.98?

A Retail -- recommended retail prices in the industry have obviously risen over the years, they have gone up from 5.98 to 4.98 to 5.98 to 6.98.

THE COURT: He's talking about on a single record, have you ever during the course of the promotion of a single record raised the price.

THE WITNESS: Not that I am aware of.

MR. SCHURTMAN: When you say single, your Honor, that has a technical connotation.

THE WITNESS: A technical selection, I presume.

Q Let me see if we can clarify that one point.

There have been industry-wide price increases from, say, 5.98 to 6.98, have there not?

A In recommended retail prices, yes.

Q When these price increases occurred, even though records were on the market which had been selling at 5.98, these same records were repriced at 6.98, is that correct, as part of an over-all increase?

A Yes, from various dates, yes.

Q All right.

So it is feasible to change the price of an album in the middle of its promotion, isn't it?

THE COURT: That's such a different thing, Mr. Schurtman.

Go to something else.

MR. SCHURTMAN: All right, your Honor.

Q In connection with the price, Mr. Menon, if you had charged 6.98 for the album instead of 5.98, in your opinion would fewer people have bought the album?

A No, not of this album.

Q Why wouldn't it make any difference, could you explain that.

A Yes. Because in our experience with artists of Mr. Lennon's caliber against the background of an industry where the general range of retail prices for that category of product is 6.98, the demand is not elastic between that 5.98 and the 6.98 category. That is our experience in the past, and I have no reason to assume that it would be any different in this particular case.

Q So that people would be just as willing to buy the album at 6.98 as at 5.98?

A I'm not sure about the willingness. We don't

believe we would have any loss of sales as a result of increased price.

Q Do you know whether the sales of Rock 'n' Roll were appreciably lower than the sales of Walls and Bridges, the preceding album?

A I believe they were.

Q According to an exhibit furnished to us by your counsel --

MR. SCHURTMAN: Perhaps we should mark it in evidence.

THE COURT: All right.

MR. SCHURTMAN: May I mark this as our next number.

xx (Plaintiff's Exhibit 200 marked for identification.)

THE COURT: Does anybody know what the plaintiff's exhibits are up to?

MR. BERGEN: The last one that we seem to have here is 103.

xx (Plaintiff's Exhibit 110 marked for identification.)

MR. SCHURTMAN: Since this was prepared by defendants, may I offer it in evidence.

THE COURT: Any objection?

MR. PRETTYMAN: No objection.

MR. BERGEN: No objection.

MR. PRETTYMAN: The only question I have about that, your Honor, is that that does contain very valuable and secret information that is currently of great use to our competitors.

I wonder if we can't enter it with the same stipulation that we did before, namely, it will not be shown outside of counsel and their clients, and that if that is sealed and then returned to us after the trial, that would be fine.

MR. SCHURTMAN: I don't know of any such stipulation, but I certainly don't object to it.

THE COURT: In other words, it is strictly for this litigation, fine. All right.

THE COURT: Mr. Prettyman, it will be up to you to sort of police that.

MR. SCHURTMAN: To identify the exhibit for the record, it is entitled, "John Lennon Sales History" and it shows the sales of Lennon albums from December 1970 through February 1976.

THE COURT: All right.

Exhibit 110 is received.

(Plaintiffs' Exhibit 110 received in evidence.)

xx

BY MR. SCHURTMAN:

Q Mr. Menon, let me show you Exhibit 110. I want to ask you a couple of questions about it.

According to this exhibit, Walls and Bridges, which was the Lennon album that immediately preceded Rock 'n' Roll, during the years '74, '75 and '76, up to February, 1976, had net sales of 425,000.

The Rock 'n' Roll album --

THE COURT: Walls and Bridges what?

MR. SCHURTMAN: Walls and Bridges, which was released in September, 1974, during the period September, 1974 through February, 1976, had net sales of 425,000. Rock 'n' Roll, which was released in February 1975, during the one-year period to February 1976, had net sales of 342,000.

THE COURT: What is your question?

BY MR. SCHURTMAN:

Q My question is this:

Isn't it true that the Walls and Bridges album contained original compositions by John Lennon?

THE COURT: Look, Mr. Schurtman, we all know that. If you are just going to argue with the witness, I don't need that.

What fact are you trying to bring out?

MR. SCHURTMAN: My question to the witness, your Honor, if I were permitted to ask it, would be whether the fact that Walls and Bridges contained original compositions and performances, while Rock 'n' Roll was a rehash of old rock and roll tunes, whether in this witness' opinion that had a bearing on sales.

THE COURT: That is a question.

Q Can you answer that question?

A No, I don't believe so. Not necessarily, and I don't believe it was a rehash of old recordings anyway. There were new recordings, possibly old compositions.

Q It was older compositions, was it not?

A Yes, there were.

Q None of them were by John Lennon?

A Not to my knowledge, no.

Q Your view that had absolutely no bearing on sales?

A I don't believe that it would have had any significant bearing on sales.

Q All right.

Did Mr. Lennon ever tell you or anyone at Capitol who reported it to you, that he wanted to put out Rock 'n' Roll as a television album rather than as a regular retail album in order to by-pass the critics?

A No, not to my knowledge.

Q Mr. Coury never mentioned to you that Lennon had told him that?

A No.

Q Do you know whether Capitol or anyone acting on behalf of Capitol persuaded Mr. Lennon that he had nothing to fear from the critics and that he should sell the album on the regular retail basis rather than by means of television?

A I have no knowledge at all of anyone from Capitol discussing the question of critics with Mr. Lennon.

Q I see.

A We did discuss the alternatives of marketing this record through television and throughout retail -- normal retail trade. But those options were not, to my knowledge, ever considered in connection with any view that critics may take.

Q Mr. Coury never told you that this point was discussed with Lennon?

A Not that I can recall.

Q All right.

Do you know what kind of reviews Rock 'n' Roll got in the public press?

A I can't recall at this time.

Q Did you read any of them?

A I may have done at that time, at the time of its release.

THE COURT: Proceed, please.

Q Mr. Menon, I show you Plaintiff's Exhibit 200, which is the Village Voice of Monday, March 10, 1975. I direct your attention to a review by a critic named Greil Marcus, on page 101.

Did you ever read this review?

A No.

Q Did anyone ever call it to your attention?

A No.

MR. SCHURTMAN: Your Honor, I offer this issue of the Village Voice in evidence.

THE COURT: Any objection?

MR. BERGEN: No objection, your Honor.

THE COURT: All right. Received.

What page is it on?

MR. SCHURTMAN: 101.

(Plaintiff's Exhibit 101 marked for identification.)

BY MR. SCHURTMAN:

Q Mr. Menon, I show you an issue of Rollin' Stone Magazine, dated May 22, 1975, and I call your atten-

tion to a review of Rock 'n' Roll --

THE COURT: What is the exhibit number?

MR. SCHURTMAN: Plaintiffs' Exhibit 201 for identification --

Q I show you a review by John Landau. Are you familiar with this review?

A No, I haven't read it.

MR. SCHURTMAN: Again, I offer it in evidence as Plaintiffs' Exhibit 201. Page 66 thereof.

Q Did anyone at Capitol tell you --

THE COURT: No objection, I assume, so I will receive it.

xx (Plaintiffs' Exhibit 201 received in evidence.)

MR. SCHURTMAN: Would your Honor want a moment to look at it? It is page 66.

THE COURT: Yes. Go ahead.

BY MR. SCHURTMAN:

Q Mr. Menon, did anyone at Capitol tell you what kind of reviews the Lennon album was getting?

A I don't believe so.

Q When you testified earlier you said that you felt that the Roots cover was in bad taste, and that this had some sort of a prejudicial impact on Capitol.

Could you explain in what way it would have a

prejudicial impact on Capitol?

A I think it had a seriously prejudicial effect on Mr. Lennon --

THE COURT: Just a little slower, please.

THE WITNESS: I think it had a seriously prejudicial effect on Mr. Lennon. Both the illustration of him, the photograph chosen, as well as the manner in which the cover was sought to be printed were, as I believe I said, to put it mildly, appalling, and to the extent that it denegrated the image of the artist, it had an impact on Capitol.

Also, the fact that all Mr. Lennon's recordings have, in our opinion, been associated in the public's mind with being productions that Capitol released, there would have been serious risk that the bad taste the cover may have come to have been associated as having had -- as Capitol having been a party to it.

Q Do you know for a fact that this happened, or is this simply your surmise?

A It is a surmise, I think, based on my own and a number of people who are well qualified in the fields, opinion.

Q Are you in a position to tell the Court whether any sales of the Rock 'n' Roll album were lost because some-

body looked at the Roots album and said "My God, this is in bad taste. I won't buy anymore Lennon product."

A I think I am in a position to express an opinion that that was possible.

Q But did it in fact happen? Do you know whether it in fact happened? Have you made any studies?

A No, we have not conducted any.

Q On the subject of good or bad taste, let me show you Plaintiffs' Exhibit 3A, the Two Virgins' album, with which I'm sure you are familiar. Let me ask you --

THE COURT: That is a matter of argument.

MR. SCHURTMAN: What I want to get -- the witness has expressed his opinion on what constitutes good or bad taste. At the very least I want to ask him does he consider this in good taste --

THE COURT: That is just argument. They are pretty different. Whether anybody considers one bad taste or good taste --

MR. SCHURTMAN: I know --

THE COURT: It is so radically different.

MR. SCHURTMAN: My next question would be after the Two Virgins album appeared, and after it was criticized as being in bad taste, I would ask what impact did this have on the sales of subsequent Capitol albums. That he should

be in a position to tell me about.

THE COURT: Let's not argue with the witness.

Q Do you understand the question?

A Not really.

Q You don't know whether --

A I don't know what question you are asking now.

Q My question at this point is, after Capitol refused to release the Two Virgins album, and after the Two Virgins album was released on a separate label, and after it was panned by the critics as being in bad taste, did this have any impact on Capitol's subsequent sales of Lennon albums?

A Am I to assume that it was in bad taste?

Q All I'm telling you is that the press, the reviewers said it was in bad taste.

THE COURT: What reviewer said it was in bad taste?

MR. SCHURTMAN: That was the evidence we offered at the first trial, your Honor. We offered numerous reviews, magazine articles, which you felt were not receivable at that point, but you gave me permission to refer to them again in this phase of the case.

THE COURT: Look, Mr. Schurtman, the kind of sensational thing like the Two Virgins is a completely

different item than what was complained about in Roots.

Let's stick to Roots.

MR. SCHURTMAN: Perhaps, your Honor, we could clarify what the issue is on good taste or bad taste, because I'm not sure I know.

If I understand the defendant's position correctly, they say the Roots cover is in bad taste and that this had an adverse impact --

THE COURT: I don't want to spend a lot of time arguing. They say --

MR. SCHURTMAN: I just want to know what the issue is.

THE COURT: You know what the issue is.

In other words, if somebody, for reasons put out a provocative somewhat sensational album with two nude figures of avante guard music, that is a completely different article than the Roots album.

They are complaining about the Roots album because it is an important picture of a person's face, it has bad coloring, it has bad typography, it has advertising on the back for other artists. They complainted that it is cheap and vulgar in the sense of that milieu.

Now, it could be completely different, a deliberate plan selected album, with two nude figures on it,

that is a completely different article.

What views we have, and what the press would say about that, is different, and Idon't see any reason in getting in endless controversys about what happens with either one.

MR. SCHURTMAN: What I would like to know, I'm simply trying to get the defendants contentions clarified at this point so I can meet them.

They seem to be contending that the alleged poor picture of Lennon -- and I don't concede that it is -- the alleged poor typography, and I don't concede that it is -- but that all these alleged infirment is in Roots album somehow had an adverse impact on the sales of the Rock 'n' Roll album.

THE COURT: You can go into that to your hearts content but it has nothing to do with the Two Virgins. Did the Virgins have advertising on the back --

MR. SCHURTMAN: I am going to get into that, too, your Honor, but only one step at a time.

Q Let me show you a more recent album, Plaintiffs' Exhibit 75, Shaved Fish.

MR. SCHURTMAN: Did this come out after Rock 'n' Roll? Yes, it did.

Q Shaved Fish was --

THE COURT: When did Shaved Fish come out?

MR. SCHURTMAN: It is on that exhibit that I just offered, your Honor. Shaved Fish came out in November, 1975. While the Rock 'n' Roll album was still being sold.

THE COURT: All right.

Q Shaved Fish was distributed by Capitol, was it not?

A Yes.

Q Let me ask you, do you regard the cover of Shaved Fish as being in good taste?

A Very much so, yes.

Q Do you think the naked bottom of a young lady sticking up in the air is in good taste, is that your opinion?

THE COURT: You know, Mr. Schurtman, I tell you, I'm going to tell you once and for all that the mere label

"good taste" is not going to help you.

MR. SCHURTMAN: Either way?

THE COURT: No, it's a matter of -- it is not what Emily Post would call good taste. That isn't what anybody is even talking about here. It is the kind of thing that would have some impact on the type of people that buy these records.

I suppose a nude figure or a nude -- parts of a nude figure might have an impact, but if Mr. Lennon and Capitol planned it this way, and they thought it would have an impact, that is a different matter.

The issue is that here was an album, the Roots album that came out, it wasn't Lennon's planning, it wasn't Capitol's planning, it was something Levy planned, and it was -- they contend it had certain infirmities. Bad taste may be a phrase that has been used, but it really doesn't have anything to do with good or bad. There are a lot of people who would say that none of the music -- none of it is good taste because all they like is Gregorian Chants or something. But that isn't the issue.

MR. SCHURTMAN: Let's drop the good taste issue then. I didn't inject it into this case; the other side did. If we can get away from that then I won't

spend time on good or bad taste.

THE COURT: Why don't you leave that as such.

MR. SCHURTMAN: I do want to offer 75 in evidence.

THE COURT: Yes, you can do that.

(Plaintiffs' Exhibit 75 received in evidence.)

BY MR. SCHURTMAN:

Q Mr. Menon, you testified, and the Judge just referred to the fact that the Roots album advertised other records on its cover.

A On its outer cover, yes.

Q On its outer cover.

Do you draw a distinction between outer and inner?

A There happens to be a distinction, of course.

Q What is the distinction?

A One goes inside the outer cover, and it happens to encase the record.

Q I understand the physical distinction, but what is the significance of the distinction?

A One of the significances of the distinction is that the inner cover is not seen. From the outside.

THE COURT: I'm not sure what we are talking

about. The advertising was on the jacket.

MR. SCHURTMAN: Yes.

THE COURT: What is your question?

MR. SCHURTMAN: Mr. Menon, your Honor, made a point of the fact that it was the outer jacket. I think I know why he is making the point because we will get to that in a moment.

Let me ask him a question and it will be clarified.

THE COURT: Proceed.

Q Let me show you Plaintiffs' Exhibit 83-J for identification. This is an album of Verdi's Requiem. Did Capitol put it out?

A Yes.

Q It is a Capitol product, isn't it?

A Yes.

Q And I show you on the inside of the album appears a flyer. This is something that the customer sees when he first opens the album. The flyer advertises Toshiba television sets, radios, record players and so on.

What is the difference in your mind between an album advertising other albums on its cover and one of your Capitol albums, Verdi's Requiem, advertising Toshiba industrial products on the inside?

THE COURT: Is there an objection?

MR. GRUMBACH: I don't see the relevance.

THE COURT: Sustained.

MR. SCHURTMAN: I make an offer of proof that I don't see any appreciable difference between the two, that if Capitol considers it proper to use its records as vehicles for advertising industrial products, then there is certainly no objection --

THE COURT: No, look --

MR. SCHURTMAN: -- to a record being used --

THE COURT: -- if we are going to get into the question of comparing the advertising of products on the interior of a Verdi's Requiem album versus the advertising of other artists on the jacket of a John Lennon record, that is an issue I'm not prepared to undertake.

Verdi died some time ago. Verdi is -- it is just a completely different thing.

MR. SCHURTMAN: Elizabeth Schwartzkopf, Ludwig Beethoven and Karl La Maria Giulini didn't die recently. These are Capitol artists. They are using an album of famous Capitol artists to advertise Toshiba television sets.

THE COURT: If they choose to do that, if

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the artists don't object -- if those particular artists don't object, okay.

MR. MR. SCHURTMAN: But the issue is the impact on the buying public, your Honor, and it is for that purpose I am offering it. If they don't think it will have an adverse affect on the buying public in one case then why would it in the other case?

Again, this is an issue that the defendants have injected. I haven't put it in. I'm entitled to rebut it as best as I can.

THE COURT: Rebut it. They we are going to go into all the distinctions between the Verdi Requiem situation and the inside brochure situation --

MR. SCHURTMAN: I don't know what the distinctions are. Maybe the witness can tell me.

THE COURT: I'm sure it will be a fruitful subject for exploration by all parties once we get into it.

MR. SCHURTMAN: I again offer 83-J. If you won't accept it then I make it an offer of proof.

THE COURT: I won't.

MR. SCHURTMAN: In that case I make an offer of proof as to 83-J to show that Capitol does consider it appropriate in an album sold to the general public

to advertise industrial products.

THE COURT: Did Verdi give consent? No, Verdi is dead. Did Elizabeth Schwartzkopf and Nicolai Geda give consent? I don't have the faintest idea.

MR. SCHURTMAN: It is an issue of what damages will it cause. That is what we are talking about now, damages, dollars and cents.

THE COURT: How many copies of Verdi's Requiem were sold?

MR. SCHURTMAN: I'm sure more than Roots. At least I hope for Capitol's sake that more than 1,200 were sold.

THE COURT: More than Rock 'n' Roll? Did the Verdi's Requiem sell more than they expect to be sold by a John Lennon record? It is just a can of worms, Mr. Schurtman.

MR. SCHURTMAN: Your Honor, the issue as I understand it is that they claim that the advertisement is on the back of the 1,200 Roots albums that were sold had a measurable impact in terms of damages on Capitol.

THE COURT: They say that it helped -- that it was a contributing factor in demeaning Mr. Lennon as an artist.

MR. SCHURTMAN: I would like to know what that

means in terms of impact on sales.

THE COURT: I think you have said -- I would not expect him to be able to say that so many albums were -- of Rock 'n' Roll weren't sold because John Lennon's-- there was advertising on the back of Roots. That really isn't anything one would expect.

Let's go on to something else.

MR. SCHURTMAN: On that same point, your Honor, I would like to offer as Plaintiffs' Exhibit 83-E an album put out by RCA of Juan Bream. On the back they advertise albums by other artists, Leontyne Price, Arthur Fiedler, and I offer it for the purpose of showing that it is an accepted practice in the record industry, and I am not getting into the consent issue, but simply showing the practice, to advertise other albums on the outside cover. It is not an unusual practice.

MR. BERGEN: Objection, your Honor. It is not John Lennon's practice.

MR. SCHURTMAN: I offer it for that purpose.

We are talking about the industry practice now.

MR. GRUMBACH: I would also add to that that we are not talking about rock and roll records here, we are talking about classical records.

MR. SCHURTMAN: I do offer 83-E on that point.

THE COURT: The distinctions are so great I am not going to accept it.

MR. SCHURTMAN: In this case I make an offer of proof to show that it is not an unacceptable industry practice to advertise the records of other artists on the back cover.

THE COURT: Mr. Schurtman, I think we all know that when -- I don't really know the popular record market, and I don't know the standing of the artists very well, but I buy classical records, and if I buy a record, a Columbia record of a Heifetz recording, or whatever I might buy, it might have inside advertising of other high quality, Piadagorsky or Rubinstein or what have you --

MR. SCHURTMAN: Does that shock you when you do that?

THE COURT: I will say that, just to comfort you, that I would take judicial notice that this is done, and the question is -- take it for what it is worth.

MR. SCHURTMAN: It is also done on the outside, on the back cover.

THE COURT: Outside or inside, fine.

MR. SCHURTMAN: May I offer it for that purpose?

THE COURT: I told you, I will take judicial notice.

MR. SCHURTMAN: In order to proect the record I would make it an offer of proof.

THE COURT: All right, you can have 83-E in.

(Plaintiffs' Exhibit 83-E received in evidence.)

THE COURT: Those things are done so carefully and I'm sure there is endless consideration given to the manner of who is there, the taste with which it is done, and so it doesn't really solve the problem, the fact that Rubinstein is advertised on a Heifetz album.

MR. SCHURTMAN: The problem is what is the impact on the buying public, and unless and until we get some evidence on that point, I think all of this is not terribly relevant.

THE COURT: All right. Go on.

BY MR. SCHURTMAN:

Q Mr. Menon, during the fiscal 1975 -- incidentally, what period would fiscal 1975 cover?

A July 1, 1974 to the 30th of June, 1975.

Q So that would include the period during

which you were selling the Rock 'n' Roll album, at least the first few months of it?

A It would include the period from the 13th of February to the 30th of June.

Q Is it fair to say that during that period there was a high level of unemployment among young people who are the best customers for records and tapes, and that consumer demand for Capitol's records and tapes dropped sharply?

A That was part of our experience in that period, yes.

MR. SCHURTMAN: Your Honor, Mr. Kanzer has come in. Would you give me two minutes to confer with him whether there is anything else?

THE COURT: All right.

(Pause.)

BY MR. SCHURTMAN:

Q On the question of the 1973 settlement of a copyright infringement dispute between Big Seven and Apple Records, where John Lennon agreed to do certain things -- are you at all familiar with that, Mr. Menon?

MR. PRETTYMAN: May I have that read back. Your voice was so low.

(Record read.)

MR. PRETTYMAN: I object. That relates to his counterclaim against somebody else, and not to me.

THE COURT: Mr. Schurtman, please go on.

MR. SCHURTMAN: I have two or three questions.

A I am only vaguely aware of it.

Q Did you ever discuss with anyone late in 1974, the beginning of 1975, whether Mr. Lennon was required by the terms of that settlement to include certain songs in the Rock 'n' Roll album which you were going to release and distribute?

MR. PRETTYMAN: May I have a continuing objection? This has nothing to do with my case whatever.

THE COURT: Objection overruled.

A Not that I can recall.

Q Nobody ever told you that and you had no discussion, right?

A I can't remember having done so at that time, no.

MR. SCHURTMAN: I have no further questions of this witness.

THE COURT: Could I see that -- what is the exhibit, that telegram that Mr. Bergen was talking about?

Mr. Menon, at the end of the day yesterday, Mr. Bergen refreshed my memory as to some parts of the record of the earlier trial, and he mentioned -- and I think this is confirmed by the record -- that the night of January 30th, the night after the meeting between Seider and Levy, Seider and Lennon called Mr. Coury in California and, I think that the evidence is that they told him that Levy was intending to come out with the album. Isn't that what you --

MR. BERGEN: And Mr. Tillinghast. Mr. Lennon and Mr. Seider spoke to Mr. Coury and to Mr. Tillinghast that night.

THE COURT: I just want to know, I had forgotten that at the time I was questioning you, Mr. Menon, and I would like just to complete the things I was asking you.

Does that refresh your memory at all in the

sense, do you recall being told about that report to Coury and/or the report to Tillinghast?

THE WITNESS: Yes. I would like to say, your Honor, that it was clear from what you were asking me yesterday that it was very important to get a fix on these exact dates. As I explained to you yesterday, I really was unable to recall between those four or five days, as I pointed out there was a weekend. I have, having recognized the importance of those particular days, in fact, between that time period of a week, I have since then, last night, spoken to Mr. Tillinghast and Mr. Carp --

THE COURT: Were you going to go into this on redirect?

MR. PRETTYMAN: That's right, yes.

THE COURT: Would you prefer to do that?

MR. PRETTYMAN: No. I just as soon he tell the story.

THE WITNESS: And I have had them refer to their own file notes and documents and research this thing in as much detail as they could. This has very considerably in comparison to yesterday refreshed --

THE COURT: Very considerably what?

THE WITNESS: In comparison to my recollection of yesterday, it has refreshed my memory, my recollection

of what occurred in that period.

I could briefly go through that with you if you wished.

THE COURT: I would appreciate you doing that, yes.

THE WITNESS: It really starts on the 30th. If I could borrow that calendar, Mr. Bergen.

Which was a Thursday.

THE COURT: Make sure I hear. You said the 30th or the 13th?

THE WITNESS: The 30th, 30.

THE COURT: So that is when -- what you are telling me now starts with Thursday the 30th of January, 1975.

THE WITNESS: That's right.

THE COURT: Go ahead.

THE WITNESS: On that -- it would appear that it was on the 30th that I first heard from Mr. Alan Klein.

THE COURT: What did you hear from Alan Klein?

THE WITNESS: He informed me that Mr. Levy had informed him that he was intending to go ahead with the release of the Roots album and promote it on television. And I believe Mr. Klein also called me again on the 31st, which was a Friday. In that -- on the 30th, when I

came to here of this from Mr. Klein, I did inform my -- both my in-house attorneys of this, Mr. Carp and Mr. Tillinghast --

THE COURT: And that was the 30th?

THE WITNESS: That was Thursday the 30th.

THE COURT: And you informed both Carp and Tillinghast of the Klein call?

THE WITNESS: Yes. And the condensed offer of Mr. Levy, and told him that Klein claimed that Levy had told him that he was going to go ahead with this thing.

THE COURT: Go ahead.

THE WITNESS: Mr. Tillinghast then established contact, or -- there was a conversation between Mr. Tillinghast and our New York attorney Mr. Granett on the subject on that day. As also, I believe, between Mr. Tillinghast and Mr. Seider.

THE COURT: On the 30th?

THE WITNESS: On the 30th.

THE COURT: All right.

THE WITNESS: We were attempting at this point to obtain as much information about the background of this matter as we could, having been -- having received the news from Klein, and a number of discussions

between Tillinghast, Granett, Carp,took place both on the 30th and the 31st, and, indeed, Mr. Seider, at our request, met with Mr. Granett in New York, where Mr. Seider was at that time, and had a conversation with him on the 31st, which was a Friday.

I was in contact with my lawyers at the same time during these two days as well. Thereupon, we went into the weekend and I had no particular conversations of any consequences as far as I know, and certainly not involving me.

During the week of Monday, the 3rd of February, there were further conversations between Mr. Granett, Mr. Carp and Mr. Tillinghast.

THE COURT: So we had Monday, February 3rd, and further conversations among whom?

THE WITNESS: Mr. Sol Granett in New York and our counsel, Mr. Carp and Mr. Tillinghast.

THE COURT: All right.

THE WITNESS: This matter at that point -- at that point our ability to proceed with this -- with this with dispatch suffered something of a setback because Mr. Granett's wife on the 2nd suffered a heart attack --

MR. PRETTYMAN: I believe it was the 3rd.

THE WITNESS: On the 3rd, and he was naturally

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not available for a period of time on the 3rd and possibly on the 4th.

THE COURT: When you mentioned yesterday the --

MR. PRETTYMAN: Your Honor, could I complete this? I think I could help for him to complete it.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MR. PRETTYMAN:

Q Was there a meeting in New York involving both Mr. Seider and Mr. Lennon?

A Yes. Shall I just complete the chronology of this?

Q That is why I am trying to help. I thought you had.

A I haven't quite finished.

Q Go ahead.

A On the 4th, I believe it was, Mr. Tillinghast came into New York from Los Angeles, both in connection with some other business he had at that time and also in connection with the Levy development.

During his stay in New York he may have arrived here on the third night or on the fourth, he held, to the best of my knowledge,at least two meetings which -- at which were present Mr. Seider, Mr. Bergen, Mr. Sol

Granett and --

THE COURT: Just a minute. Seider was present?

THE WITNESS: Yes.

THE COURT: Lennon?

THE WITNESS: Lennon at one of the meetings, for a part of one of the meetings --

MR. PRETTYMAN: He was present for one of the meetings for part of that meeting.

MR. BERGEN: Mr. Lennon.

THE COURT: Who else participated in these?

THE WITNESS: Mr. Bergen --

THE COURT: Mr. Bergen?

MR. BERGEN: Yes, your Honor.

THE COURT: Who else?

THE WITNESS: Mr. Granett. And Mr. Gold, who is an associate of Mr. Granett's, and May Pang.

THE COURT: Gold?

MR. PRETTYMAN: G-o-l-d.

THE COURT: And May Pang?

THE WITNESS: Yes.

Q Was Mr. Hall present, from EMI?

A Yes. Mr. Laurie Hall, who is with EMI's legal department --

THE COURT: Loring --

THE WITNESS: L-a-u-r-i-e Hall.

THE COURT: Is he from England?

THE WITNESS: He is from England. He is a member of EMI's legal department based in London.

THE COURT: All right.

THE WITNESS: He was also in New York during that particular week and he was -- he also attended these meetings in New York.

This was on the 4th and 5th, possibly on the 6th -- it was in those three days, Tuesday, Wednesday and the Thursday of that week.

THE COURT: Were you informed of what was going on?

THE WITNESS: Yes. I was in fairly close and frequent contact with Mr. Tillinghast. Very largely my recollection of what was being communicated to me was the -- was the facts of how this whole situation developed, which Mr. Tillinghast was finding out from Mr. Seider and May Pang, from Mr. Lennon and from Mr. Bergen, the actual events that led to the situation.

So they were also exploring various alternative course of action that could be taken to prevent Mr. Levy from pirating our record.

THE COURT: Do you have anything more to ask

him or do you have anything more to add on?

THE WITNESS: Sometime during this particular week, your Honor, and where I am unable to fix an exact date, but it would have had to have been the 5th or the 6th of February, we had also received information from these advertising agencies, who I mentioned yesterday, which reconfirmed that Levy was in fact booking television time to advertise the album. And in fact, we got a list of the stations where the time had been commissioned for purchase.

That took us through to the 6th, which was a Thursday. In that particular week, my last conversations with Mr. Tillinghast on the -- primarily on the legal aspects of this matter were on the 7th when I had left Los Angeles for New Orleans and I called him from there to inquire what was proposed with relation to trying to stop the album from going out.

THE COURT: You left for New Orleans when?

THE WITNESS: I left on the 7th. That was a Friday. I believe it was on the 7th that the first of our telegrams were sent out. That is the -- that was the sequence of events from the 30th to when the telegrams were sent on the 7th.

THE COURT: Are you able to tell me now, or

would somebody else know better, why it was decided -- let me put it more generally:

What were the alternatives that were considered and why was the course of action selected that was selected? Are you aware of that or would somebody else know better?

THE WITNESS: I am not aware of the details of the legal issues that were involved. My main requirement was -- my main advice to my lawyers was to find the most effective and practical means in the time period available to prevent this thing from happening. But since I was neither personally involved during the discussions, nor would I normally get involved in the technical issues involved in a matter such as this, and I think we concluded by the end of that week that our best course was to send these telegrams, which we did.

THE COURT: You are not able to tell me why it was concluded that Capitol would not go into Court and seek a restraining order or some possible voluntary arrangement to maintain the status quo?

THE WITNESS: I believe, your Honor, that in considering that as a possibility our lawyers concluded that we didn't stand a terribly good chance of obtaining a TRO followed by an injunction.

THE COURT: Do you know why they drew that conclusion?

THE WITNESS: No, not the specific reasons, I can't recall them. I should probably also mention, if I may, that on either the 30th or 31st, of course that telegram on behalf -- I think by Mr. Lennon was sent to us,

reassuring us that no rights had been given to Levy for any agreement made with him with respect to the Roots album.

THE COURT: Do you have anything else, Mr. Prettyman?

MR. PRETTYMAN: I have nothing else for Mr. Menon. Could I have one moment to confer with Mr. Bergen?

THE COURT: Yes.

MR. SCHURTMAN: I do want to ask Mr. Menon a couple of questions on that point.

MR. GRUMBACH: I have one question that I'd like to ask him.

THE COURT: Let's finish with the defendants.

MR. GRUMBACH: Mr. Prettyman has nothing further of Mr. Menon.

MR. PRETTYMAN: No. I just want to talk to Mr. Bergen about something else.

THE COURT: You can take a minute.

(Pause.)

THE COURT: We do want to finish the examination of this witness.

MR. SCHURTMAN: It is on that same point.

xx CROSS EXAMINATION (Continuing)

BY MR. SCHURTMAN:

Q Mr. Menon, I take it you personally approved

the decision not to seek a preliminary injunction, a TRO, and to follow the telegram route instead?

A I accepted the advice and recommendation of my lawyers.

Q On what date did you accept that recommendation, do you recall?

A I think the matter was under consideration during that period. I can't recall the exact date when we --

Q Well, would it fix it in your mind, was it before or after you left for New Orleans on February 7?

A It was probably when I was in New Orleans, or shortly before.

Q Were you the one who made the alleged decision to rush the release of the Rock 'n' Roll album?

A I was amongst a group of people who did.

Q On what date did you make that decision?

A To start preparing for it, probably around the 7th or the 8th.

Q What specific instructions did you give regarding what should be done to rush the release?

THE COURT: Let me just pause there. You are saying that that decision was made sometime on the 7th or 8th?

THE WITNESS: Yes.

THE COURT: All right.

Go ahead, Mr. Schurtman.

MR. SCHURTMAN: Could you read me the last question?

(Question read.)

THE WITNESS: Well, we had concluded that the release should be -- the manufacturing processes associated with it should be expedited, that the jacket should be produced with all possible speed, and so on.

I didn't give any specific instructions because it was not my job to do so. Those concerned were the plants and others issued the print orders to the printer and so on.

Q Whose job was it to implement the decision to rush the album, is he in court today? Will he testify?

A As to what he did --

Q Who was it?

A A lot of people --

THE COURT: Lawyers?

Q Do you know who implemented the instructions?

A Yes, various people did.

Q Who was in charge of implementing them, the top man.

A The National Plant Management, which involves three manufacturing plants in the United States, were all

under instructions to do so. The Merchandising Division and the head of our record company is here, who is in charge of that department, did rush this -- do everything possible to get the cover out fast.

Q Were your instructions oral or in writing?

A Oral.

Q Do you know of any written memorandum which was prepared on or about that time which discussed the pros and cons of releasing the record quickly or holding off another two or three weeks?

A I know of no written memoranda or other documentation.

Q Were the pros and cons discussed at all?

A Very carefully.

Q With whom?

A With Mr. Don Zimmerman, with Mr. Brown Meggs, with Mr. Al Coury and with myself.

Q Was anything said about what alternative steps could or should be taken if your telegram campaign to stop the Roots album turned out to be successful?

A No, I don't believe -- I can't remember having formulated any second plan. The television was supposed to occur over that particular weekend of the 8th and 9th. We would have had fairly quick information as to whether or

not it took place, and in fact I believe we had information, because we did have a number of people watching to see whether the thing was going to be on television.

Q My question was, did you have any plans --

A No, on the -- we did not have a second line plan. We probably would have intended to develop one if the need arose.

REDIRECT EXAMINATION

BY MR. PRETTYMAN:

Q Mr. Menon, when is the chief principal impact of an album on the market in terms of time, from its moment of release, when is its largest selling period?

A Immediately upon release.

Q And, in other words, it has its greatest impact immediately and then the impact begins to decline?

A No question.

MR. PRETTYMAN: Thank you.

RECROSS EXAMINATION

BY MR. SCHURTMAN:

Q May I ask what you mean by immediately in terms of days, weeks, months?

A I mean the date it hits the market place.

Q So you released it on the 13th -- was it the 13th or the 16th -- the 13th I think was the date yesterday.

THE COURT: Mr. Prettyman said that there were substantial numbers released on the 13th.

MR. PRETTYMAN: A very small number on the 12th.

Q Just to tell the Court what you mean by "immediate" how many days or weeks following the 13th would you regard as encompassed within your definition of immediate?

A If we are able to ship the initial order for a release, which we try and do, all on the same day, then it would be on that day.

If it takes a day and a half, day and a quarter, it would be in that period.

In the total initial supply of the product to the marketplace -- whenever the largest percentage of that total initial supply were achieved, that's the moment of its maximum impact.

Q How long does it normally take to ship records to different parts of the country?

A It varies upon the number of records involved.

Q Were they produced in California?

A No, they are produced in California and the State of Illinois and Virginia, and they are also distributed through seven centers, distribution centers.

Q Are you saying the distribution takes place

virtually the same date that the record is released?

A I'm not saying it does. It could be so arranged.

Q How long does it take to be called to the attention of the customers, to people who are supposed to buy the records?

A You normally engage in preparing for the release of an album by doing various things prior to the album hitting the marketplace.

You normally, if you didn't have to go through the exceptional and extraordinary rush that we had to, due to the Roots album in this particular case, you would tend, for instance, to release a single from an album some three weeks, perhaps, prior.

You would tend to proliferate the air play that that single would obtain through the enumerable radio stations around the country. You would tend to engage in a certain amount of preliminary advertising in certain cases.

You would tend to do various things in preparation for the album's arrival. You would therefore expect the impact to be when the album is offered for sale, which is on the date on which it is in the stores.

Q Is it your testimony that you have followed this procedure with respect to all other Lennon albums? Are you prepared to say that?

A I'm not prepared to say that we did it, but if we didn't there must have been some exceptional reason such as existed because of Levy's album in this case.

Q But you don't know whether you did or didn't?

A As I say, if we didn't there would have had to have been some reason such as this.

MR. SCHURTMAN: No question.

THE COURT: Anything else for Mr. Menon?

MR. GRUMBACH: Mr. Menon, in your testimony particularly yesterday, you talked about Capitol's rights in this album. I wanted to clarify it.

Were the rights that you discussed that Capitol had rights that were received through the EMI, Apple licensing agreement and then in the Apple, Capitol sub-license agreement?

A Yes.

MR. BERGEN: I have two questions, your Honor.

xx CROSS EXAMINATION

BY MR. BERGEN:

Q Mr. Menon, the events you have described in that week of February 3rd, do you know whether, at the time that these meetings were taking place among the attorneys, that Mr. Lennon was in the studio mixing the final master of the album?

A I believe he was.

Q So that these meetings among the attorneys to decide what to do, and Mr. Lennon mixing the final lacquer master, were going on kind of concurrently.

A Absolutely.

Q My last question is, was Mr. Lennon's reputation damaged by the Roots album?

MR. SCHURTMAN: I object.

THE COURT: Was his what?

MR. BERGEN: Reputation as an artist.

THE COURT: We had this. We had this described at length what he thinks the Roots album did.

MR. BERGEN: I thought he was talking mainly about the impact on the Capitol, your Honor. That's the reason I was asking for clarification. I will withdraw it.

THE COURT: All right.

Let's recess.

MR. PRETTYMAN: No more for Mr. Menon.

THE COURT: You may step down, Mr. Menon.

(Witness excused.)

(Recess taken.)

MR. PRETTYMAN: Your Honor, would you hear me for a moment because it makes a difference as to how we proceed from here?

THE COURT: Sure.

MR. PRETTYMAN: Your Honor has asked a number of questions about what happened over a few days, and in particular, in regard to legal decisions that were made, legal options that were discussed and why certain actions were not taken.

I would like to inquire as to whether that particular question is a serious one in your Honor's mind in terms of the counterclaims, and I would like to submit to you that it should not be.

It seems to me, first of all, that it speaks for itself, that in a different situation of this kind that lawyers obviously have, particuarly when you have had a number of parties, they have a number of things that have to be straightened out, a number of options that are open and all kinds of reasons why steps aren't taken.

I would suggest to you, sir, that we have not, although I think we legitimately could, if we are going to get into this kind of situation, persued the advice that Mr. Schurtman gave to Mr. Levy on the spot as to how he could proceed with his album --

MR. SCHURTMAN: I object to that, your Honor.

Mr. Prettyman has no idea what advice I gave, and I don't think it is any of his business.

MR. PRETTYMAN: Mr. Levy testified that he called Mr. Schurtman in --

THE COURT: Let's stick to your side of the fense.

MR. PRETTYMAN: What I am saying is that they didn't sue us, which was an option open to them to go in and get a TRO, I haven't gone into that.

I assume that there were particular reasons why they chose not to do that. There were a number of steps that they could have taken. Undoubtedly there was a lot of advice given to Mr. Levy, which we have not gone into as to what his legal rights were and weren't.

And I just would submit to you that the fact that the lawyers conferred and attempted to have had out the facts for a few days, and then found that the thing was on television, should not weigh heavily in your Honor's mind.

Now, if it does, I think that we are probably going to have to present evidence on it.

THE COURT: I don't want to get any one factor out of perspective. But the way it seems to shape up in my thinking, though tentatively, is this:

I will assume for the moment, and I think it is really not too startling an assumption, that I would hold that Mr. Levy acted wrongly in putting out his Roots album,

and that he violated the common law copyright, the contractual rights, the exclusive rights, and so forth, of EMI and Capitol and Apple, and all the rest, and of Mr. Lennon.

Now, the question then arises what damages?

I have heard evidence to the effect that there were -- well, I think what the evidence is leading up to is a presentation of the day that the sales of Rock 'n' Roll were prejudiced because of this situation, and yesterday it seems to me there was a pretty strong presentation about the fact that the Rock 'n' Roll album was prepared on a rush schedule; didn't get the thorough, careful treatment, and so forth, and obviously, if that is the case, if it was a poor album, and if the promotion was poor, poorer than it might have been with more time, that could affect sales in any way, that is one of the things that was being built up to yesterday.

So we get into the questionof what is it that caused the rush which led to the deficient album and promotion.

What caused it to be rushed to production and released on the 13th whereas Capitol might have liked to have had it a month later or more than a month later?

There is the doctrine in the law that you have to mitigate damages. If Capitol had a course of action open

to it which it could have at least tried, and would have prevented the release of the Roots album and prevented the promotion of the Roots album, then -- you know, if it had that course of action open to it, and if it was reasonably accessible, under all the circumstances, then that was -- would come under the heading of a duty to mitigate the damage.

No matter how bad Levy was, there is a duty to mitigate on the part of the defendants. It is very relevant to me, I think, and properly so, to consider whether the defendants acted to mitigate their problems, acted in whatever way they are supposed to under the legal standard of mitigating damages.

I must tell you that I have had a lot of actions where people have come in to me with applications to stop people from infringing their rights in copyrights and trademarks, and so forth, and they rush right in as soon as they find out somebody is infringing or threatening to infringe.

I don't know what happens in all the actions where they don't rush right in, but I sure have plenty where they rush right in.

It is a straightforward, obvious means that can be taken. I think it is very important to me, if the question of timing -- the question of timing is part of this,

as it has its effect on the quality of the Rock 'n' Roll album and the promotion of it. And I don't understand the question of timing, the whole question of whether the Roots album ever got released, could that have reasonably been prevented by Court action?

In a lot of cases people don't even have notice of a potential infringement. The first thing they know is that there is a fabric out on the market that is a copy of their copyright, or whatever you call it, fabric. They don't get advance notice that somebody is going to keep their design.

This was a somewhat unusual case. You may not have had a lot of notice but you had some notice. It doesn't often happen that way. And so to me it is a very big question and a very proper question whether you undertook the reasonable steps to mitigate.

It isn't that I would second guess a judgment, because -- but if you decide for strategy -- when I say "you" if Capitol and the other people involved, decide for strategy reasons to take one course of action over another, it may be that they have to take the bitter with the sweet. If they choose a particular course of action for business and strategy reasons, well, there may be some penalty at this date in doing so.

United States Court of Appeals
For the Second Circuit

Big Seven Music Corp. and Adam VIII, Ltd.,
Plaintiffs-Appellants,

Against

John Lennon, Apple Records, Inc., Harold Selder, Capitol Records, Inc. and EMI Records United,
Defendants-Appellees,

and

Morris Levy,
Additional Defendant on Counterclaim-Appellant.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Jerry N. Simmons, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 25 Elliott Place Bronx, N.Y. 10452

That on Nov. 19, 1976, he served

One Appendix Volume 1-6 and one Exhibit Volume and two Briefs on behalf of Plaintiffs-Appellants and Additional Defendant on Counterclaim-Appellant.

On:
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Cleary, Gottlieb, Steen & Hamilton, Esqs.
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by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Sworn to before me this
19 day of November, 1976

Notary Public